Commonwealth of Massachusetts

ATTORNEY-GENERAL'S REPORT

1917

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The Commonwealth of Massachusetts.

REPORT

OF THE

ATTORNEY-GENERAL

FOR THE

YEAR ENDING JANUARY 16, 1918.

BOSTON:
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1918.

The Commonwealth of Massachusetts.

Department of the Attorney-General,
Boston, Jan. 16, 1918.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith my report for the year ending this day.

Very respectfully,

HENRY C. ATTWILL,
Attorney-General.

The Commonwealth of Massachusetts.

DEPARTMENT OF THE ATTORNEY-GENERAL,
State House.

Attorney-General.
HENRY C. ATTWILL.

Assistants.
NELSON P. BROWN.
H. WARE BARNUM.
WM. HAROLD HITCHCOCK.
ARTHUR E. SEAGRAVE.
JOHN W. CORCORAN.
CHARLES W. MULCAHY.

Chief Clerk.
LOUIS H. FREESE.

Statement of Appropriation and Expenditures.

Appropriation for 1917,	$49,000 00
Expenditures.	
For law library,	$1,344 44
For salaries of assistants,	18,066 66
For clerks,	6,038 34
For office stenographers,	4,583 33
For telephone operator,	677 66
For legal and special services and expenses,	8,526 48
For office expenses,	3,794 77
For court expenses,	5,550 90
Total expenditures,	$48,582 58
Costs collected,	2,388 02
Net expenditures,	$46,194 56

The Commonwealth of Massachusetts.

Department of the Attorney-General,
Boston, Jan. 16, 1918.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 8 of chapter 7 of the Revised Laws, as amended, I herewith submit my report for the year ending this day.

The cases requiring the attention of this department during the year, to the number of 8,713, are tabulated below: —

Corporate franchise tax cases,	1,030
Extradition and interstate rendition,	146
Grade crossings, petitions for abolition of,	72
Indictments for murder,	56
Inventories and appraisals,	17
Land Court petitions,	77
Land-damage cases arising from the taking of land by the Harbor and Land Commission,	4
Land-damage cases arising from the taking of land by the Charles River Basin Commission,	23
Land-damage cases arising from the taking of land by the Massachusetts Highway Commission,	34
Land-damage cases arising from the taking of land by the Directors of the Port of Boston,	3
Land-damage cases arising from the taking of land by the Metropolitan Water and Sewerage Board,	9
Land-damage cases arising from the taking of land by the Metropolitan Park Commission,	37
Land-damage cases arising from the taking of land by the Commission on Waterways and Public Lands,	3
Land-damage cases arising from the taking of land by the State House Building Commission,	9
Miscellaneous cases arising from the work of the above-named commissions,	49
Miscellaneous cases,	689
Petitions for instructions under inheritance tax laws,	96
Public charitable trusts,	107
Settlement cases for support of persons in State Hospitals,	34
All other cases not enumerated above, which include suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth,	6,218

Capital Cases.

Indictments for murder pending at the date of the last annual report have been disposed of as follows: —

Ralph V. Baker, indicted in Plymouth County, October, 1916, for the murder of William W. Cushing, at Marshfield, on Oct. 3, 1916. He was arraigned Oct. 25, 1916, and pleaded not guilty. R. M. Walsh, Esq., appeared as counsel for the defendant. In March, 1917, the defendant was tried by a jury before Raymond, J. The result was a verdict of not guilty, by reason of insanity. The defendant was thereupon committed to the Bridgewater State Hospital for life. The case was in charge of District Attorney Frederick G. Katzmann.

Giovanni Boccorossa, indicted in Hampden County, September, 1916, for the murder of Rosie Boccorossa, at Holyoke, on July 3, 1916. He was arraigned Sept. 20, 1916, and pleaded not guilty. James O'Shea, Esq., and Thomas J. Lynch, Esq., appeared as counsel for the defendant. Later the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for life. The case was in charge of District Attorney Joseph B. Ely.

Edwin D. Carter, indicted in Hampden County, May, 1916, for the murder of Richard F. Lawton, at Russell, on Jan. 11, 1916. He was arraigned May 10, 1916, and pleaded not guilty. Richard P. Stapleton, Esq., and E. J. Stapleton, Esq., appeared as counsel for the defendant. Later the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for life. The case was in charge of District Attorney Joseph B. Ely.

Frank Coletti, indicted in Norfolk County, April, 1916, for the murder of Josephine M. Coletti, at Quincy, on Jan. 20, 1916. J. J. McAnarney, Esq., appeared as counsel for

the defendant. In September, 1917, the defendant was tried by a jury before O'Connell, J. The result was a verdict of not guilty, by reason of insanity. The defendant was thereupon committed to the Bridgewater State Hospital for life. The case was in charge of District Attorney Frederick G. Katzmann.

Harold Craft, indicted in Suffolk County, February, 1916, for the murder of Eilleen T. Kern, at Boston, on Jan. 28, 1916. He was arraigned May 24, 1916, and pleaded not guilty. May 24, 1916, the defendant was released on bail. The case was in charge of District Attorney Joseph C. Pelletier.

Salvador Cremona, indicted in Hampshire County, October, 1916, for the murder of Aristides Rodrigues, at Northampton, on Aug. 4, 1916. He was arraigned Oct. 23, 1916, and pleaded not guilty. George P. O'Donnell, Esq., and Michael G. Luddy, Esq., appeared as counsel for the defendant. In February, 1917, the defendant was tried by a jury before Quinn, J. The result was a verdict of not guilty. The case was in charge of District Attorney John H. Schoonmaker.

Richard Dadah, *alias*, indicted in Hampden County, December, 1916, for the murder of Mahomet Derbas Hazardine, at Springfield, on Oct. 14, 1916. He was arraigned Dec. 29, 1916, and pleaded not guilty. William H. McClintock, Esq., and James E. Dunleavy, Esq., appeared as counsel for the defendant. Later the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for a term not exceeding nine years nor less than six years. The case was in charge of District Attorney Joseph B. Ely.

Francis Ducharme, indicted in Hampden County, December, 1916, for the murder of Ellen Kaczor, at Chicopee, on Oct. 21, 1916. He was arraigned Dec. 29, 1916, and pleaded not guilty. N. Seelye Hitchcock, Esq., appeared as

counsel for the defendant. In May, 1917, the defendant was tried by a jury before Hamilton, J. The result was a verdict of guilty of murder in the first degree. The defendant was thereupon sentenced to death by electrocution during the week beginning Sept. 9, 1917, which sentence was executed Sept. 11, 1917. The case was in charge of District Attorney Joseph B. Ely.

Hassan Durpast, *alias*, indicted in Hampden County, December, 1916, for the murder of Sarkus Dadah, at Springfield, on Oct. 14, 1916. He was arraigned Dec. 29, 1916, and pleaded not guilty. William G. McKechnie, Esq., appeared as counsel for the defendant. Later the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for a term not exceeding nine years nor less than six years. The case was in charge of District Attorney Joseph B. Ely.

Manuel Santos Ferreira, indicted in Plymouth County, October, 1916, for the murder of Jose Domingo Coutinho, at Middleborough, on Aug. 16, 1916. He was arraigned Oct. 25, 1916, and pleaded not guilty. W. M. Alston, Esq., appeared as counsel for the defendant. Later the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for a term not exceeding fifteen years nor less than ten years. The case was in charge of District Attorney Frederick G. Katzmann.

Emma Gianusso, *alias*, indicted in Hampden County, May, 1916, for the murder of Frank Daniels, Jr., at Ludlow, on March 11, 1916. She was arraigned May 10, 1916, and pleaded not guilty. E. A. McClintock, Esq., and D. B. Hoar, Esq., appeared as counsel for the defendant. Later the defendant retracted her former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was sentenced to the Reformatory for Women. The case was in charge of District Attorney Joseph B. Ely.

John Gilstrap, indicted in Suffolk County, October, 1916, for the murder of Albert Newton, at Boston, on Sept. 11, 1916. The defendant was arraigned April 25, 1917, and pleaded not guilty. F. J. W. Ford, Esq., and William H. Lewis, Esq., appeared as counsel for the defendant. On May 15, 1917, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for a term not exceeding five years nor less than three years. The case was in charge of District Attorney Joseph C. Pelletier.

Michael Glasheen, *alias*, indicted in Berkshire County, January, 1916, for the murder of Lafayette L. Battelle, at Monterey, on Dec. 13, 1915. He was arraigned April 24, 1916, and pleaded not guilty. Patrick J. Moore, Esq., and John S. Stone, Esq., appeared as counsel for the defendant. July 23, 1917, the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for life. The case was in charge of District Attorney Joseph B. Ely.

John J. Herrick, indicted in Essex County, September, 1916, for the murder of Mabel Leary, at Gloucester, on Sept. 2, 1916. He was arraigned Sept. 27, 1916, and pleaded not guilty. M. Francis Buckley, Esq., appeared as counsel for the defendant. On June 11, 1917, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was sentenced to the House of Correction for a term of two and one-half years. The case was in charge of District Attorney Louis S. Cox.

Harry Hinds, indicted in Middlesex County, June, 1915, for the murder of Marvil Elizabeth Hinds and Barbara Jesstena Hinds, at Cambridge, on April 9, 1915. He was arraigned June 24, 1915, and pleaded not guilty. William H. Lewis, Esq., and Isidore H. Fox, Esq., appeared as coun-

sel for the defendant. In November, 1915, the defendant was tried by a jury before Raymond, J. The result was a verdict of guilty of murder in the first degree. The defendant's motions for a new trial were overruled. On Dec. 11, 1917, a part of the indictment was nol prossed, leaving the defendant charged with assault with intent to murder. He was thereupon sentenced to State Prison for a term not exceeding five years nor less than three years. The case was in charge of District Attorney Nathan A. Tufts.

Charles H. Hunnewell, indicted in Middlesex County, September, 1916, for the murder of Alexander Bryan, at Somerville, on July 3, 1916. He was arraigned Oct. 10, 1916, and pleaded not guilty. Gilbert A. A. Pevey, Esq., and Edwin P. Fitzgerald, Esq., appeared as counsel for the defendant. On Nov. 23, 1916, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for a term not exceeding twelve years nor less than eight years. The case was in charge of District Attorney Nathan A. Tufts.

Michael Lopio, indicted in Essex County, September, 1916, for the murder of James Germono, at Salem, on Aug. 15, 1916. He was arraigned Sept. 28, 1916, and pleaded not guilty. On Jan. 23, 1917, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for a term not exceeding eight years nor less than six years. The case was in charge of District Attorney Louis S. Cox.

Michael Manning, indicted in Essex County, September, 1916, for the murder of Lizzie Manning, at Lawrence, on Aug. 23, 1916. He was arraigned Sept. 18, 1916, and pleaded not guilty. John P. Kane, Esq., appeared as counsel for the defendant. On Feb. 7, 1917, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea

was accepted by the Commonwealth, and the defendant was sentenced to State Prison for a term not exceeding eleven years nor less than nine years. The case was in charge of District Attorney Louis S. Cox.

Andrew Nelson, indicted in Suffolk County, November, 1916, for the murder of Carrie Baer, on Oct. 24, 1916. He was arraigned Nov. 16, 1916, and pleaded not guilty. Francis F. Harrington, Esq., appeared as counsel for the defendant. On March 19, 1917, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for a term not exceeding sixteen years nor less than fifteen years. The case was in charge of District Attorney Joseph C. Pelletier.

Antonio Ogrecci, *alias*, indicted in Hampden County, May, 1913, for the murder of Dominic Forti, at Springfield, on April 25, 1913. He was arraigned Sept. 20, 1917, and pleaded not guilty. William G. McKechnie, Esq., appeared as counsel for the defendant. Dec. 28, 1917, the Commonwealth filed a disclaimer as to the charge of murder in the first and second degrees, and in January, 1918, the defendant was tried by a jury before Hamilton, J., on so much of the indictment as charged manslaughter. The result was a verdict of not guilty. The case was in charge of District Attorney Joseph B. Ely.

Irving E. Olmstead, indicted in Suffolk County, April, 1916, for the murder of Violet C. Mooers, at Boston, on March 13, 1916. He was arraigned April 11, 1916, and pleaded not guilty. Harvey H. Pratt, Esq., and J. A. Tirrell, Esq., appeared as counsel for the defendant. On May 18, 1917, the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for life. The case was in charge of District Attorney Joseph C. Pelletier.

Oscar F. Russ, indicted in Suffolk County, September, 1915, for the murder of Emily Russ, at Boston, Aug. 23, 1915. He was arraigned Oct. 8, 1915, and pleaded not guilty. Wendell P. Murray, Esq., and Morris Katzeff, Esq., appeared as counsel for the defendant. In February, 1916, the defendant was tried by a jury before Sisk, J. The result was a verdict of guilty of murder in the second degree, and the defendant was sentenced to State Prison for life. The case was in charge of District Attorney Joseph C. Pelletier.

Theodore Semon, indicted in Suffolk County, November, 1915, for the murder of Johanna E. Donovan, at Boston, on Oct. 7, 1915. He was arraigned Jan. 15, 1917, and pleaded not guilty. William J. Miller, Esq., and David Mancovitz, Esq., appeared as counsel for the defendant. In January, 1917, the defendant was tried by a jury before Aiken, C.J. The result was a verdict of not guilty. The case was in charge of District Attorney Joseph C. Pelletier.

Stelianos Zacharachi, *alias*, indicted in Suffolk County, September, 1916, for the murder of Charles W. Craney, at Boston, Aug. 28, 1916. He was arraigned Jan. 25, 1917, and pleaded not guilty. John W. Connolly, Esq., appeared as counsel for the defendant. On March 5, 1917, the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for life. The case was in charge of District Attorney Joseph C. Pelletier.

Indictments for murder found since the date of the last annual report have been disposed of as follows: —

Gaetano Barbato, indicted in Worcester County, August, 1917, for the murder of Stephano Cherquo, at Worcester, on May 20, 1917. He was arraigned Aug. 27, 1917, and pleaded not guilty. John H. Meagher, Esq., appeared as counsel for the defendant. Nov. 9, 1917, so much of the indictment as charged murder in the first degree was nol prossed, leaving

the indictment to stand for murder in the second degree. In November, 1917, the defendant was tried by a jury before Thayer, J. The result was a verdict of guilty, and the defendant was sentenced to State Prison for life. The case was in charge of District Attorney Edward T. Esty.

Manoog Barberian, indicted in Suffolk County, August, 1917, for the murder of Sererkior Moorodian, on June 15, 1917. He was arraigned Oct. 26, 1917, and pleaded not guilty. Martin Hays, Esq., appeared as counsel for the defendant. On Nov. 8, 1917, the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for life. The case was in charge of District Attorney Joseph C. Pelletier.

Antonio Colandro, indicted in Essex County, January, 1917, for the murder of Rosario Gaudino, at Lynn, on Oct. 14, 1916. He was arraigned Feb. 2, 1917, and pleaded not guilty. Richard L. Sisk, Esq., appeared as counsel for the defendant. On June 11, 1917, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was sentenced to the House of Correction for a term of three years. The case was in charge of District Attorney Louis S. Cox.

Carmine Coshignano and Dominick Toscano, indicted in Worcester County, August, 1917, for the murder of Michael Aiello, at Worcester, on Feb. 20, 1917. The defendants were arraigned Sept. 18, 1917, and pleaded not guilty. Thomas L. Walsh, Esq., Holton Davenport, Esq., and A. B. Cenedella, Esq., appeared as counsel for the defendants. Later the defendants retracted their former plea, and each pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendants were sentenced to State Prison for life. The cases were in charge of District Attorney Edward T. Esty.

Vincenzo Graceffa, indicted in Middlesex County, March, 1917, for the murder of Salvatore Parisi, at Waltham, on Jan. 30, 1917. He was arraigned March 20, 1917, and pleaded not guilty. Frank M. Zottoli, Esq., appeared as counsel for the defendant. On March 27, 1917, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for a term not exceeding twenty years nor less than fifteen years. The case was in charge of District Attorney Nathan A. Tufts.

Sabino Iannacone, indicted in Suffolk County, January, 1917, for the murder of Carmellio Repucci, at Boston, on Dec. 3, 1916. The defendant committed suicide in jail on Jan. 6, 1917. The case was in charge of District Attorney Joseph C. Pelletier.

Alexandros Manaris, indicted in Worcester County, August, 1917, for the murder of Fotios Roumbis, at Worcester, on July 5, 1917. He was arraigned Oct. 24, 1917, and pleaded not guilty. John H. Meagher, Esq., appeared as counsel for the defendant. Later the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for life. The case was in charge of District Attorney Edward T. Esty.

Sadie McIntyre, indicted in Plymouth County, June, 1917, for the murder of David H. McIntyre, at Duxbury, on May 14, 1917. She was arraigned June 25, 1917, and pleaded not guilty. John P. Vahey, Esq., appeared as counsel for the defendant. On June 27, 1917, the defendant retracted her former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was sentenced to the Reformatory for Women. The case was in charge of District Attorney Frederick G. Katzmann.

George O. Messier, indicted in Essex County, April, 1917, for the murder of William J. Pratt, at Gloucester, on March 31, 1917. He was arraigned April 12, 1917, and

pleaded not guilty. Richard L. Sisk, Esq., appeared as counsel for the defendant. On June 11, 1917, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was sentenced to the House of Correction for a term of three years. The case was in charge of District Attorney Louis S. Cox.

Antonio Mignano, indicted in Hampden County, September, 1917, for the murder of Fiore Cava, at Springfield, on June 11, 1917. He was arraigned Sept. 21, 1917, and pleaded not guilty. William G. McKechnie, Esq., and Silvio Martinelli, Esq., appeared as counsel for the defendant. Later the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for a term not exceeding seven years nor less than five years. The case was in charge of District Attorney Joseph B. Ely.

Tadeucz Olczak, indicted in Franklin County, July, 1917, for the murder of Sophie Olczak, at Greenfield, on June 29, 1917. He was arraigned July 11, 1917, and pleaded not guilty. Frank J. Lawler, Esq., appeared as counsel for the defendant. Later the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for life. The case was in charge of District Attorney John H. Schoonmaker.

Minor U. Peterson, Earl A. Brown, Edward E. Washington, *alias,* and Clarence Baker, *alias,* indicted in Bristol County, February, 1917, for the murder of Joseph Cosmos. The defendant Clarence Baker has never been apprehended. The defendants Minor U. Peterson, Earl A. Brown and Edward E. Washington were arraigned Feb. 26, 1917, and each pleaded not guilty. John B. Tracy, Esq., appeared as counsel for the defendants. Later the defendants retracted their former plea, and each pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and each of

the defendants was sentenced to State Prison for a term not exceeding ten years nor less than eight years. The cases were in charge of District Attorney Joseph T. Kenney.

Harriet A. Varney, indicted in Norfolk County, July, 1917, for the murder of Pauline C. Keyes, at Brookline, on June 19, 1917. She was arraigned July 12, 1917, and pleaded not guilty. David F. O'Connell, Esq., and Daniel P. Callahan, Esq., appeared as counsel for the defendant. In December, 1917, the defendant was tried by a jury before O'Connell, J. The result was a verdict of not guilty. The case was in charge of District Attorney Frederick G. Katzmann.

Joseph Wakelin and Sarah Ann Wakelin, indicted in Middlesex County, June, 1917, for the murder of Lauretta W. Wakelin, at Melrose, on June 1, 1916. They were arraigned June 21, 1917, and pleaded not guilty. William R. Scharton, Esq., John G. Walsh, Esq., and Henry J. Barry, Esq., appeared as counsel for the defendants. In October, 1917, the defendants were tried by a jury before Keating, J. The result was a verdict of guilty of manslaughter in the case of Joseph Wakelin, and a verdict of not guilty in the case of Sarah Ann Wakelin. The defendant Joseph Wakelin was thereupon sentenced to State Prison for a term not exceeding five years nor less than three years. The case was in charge of District Attorney Nathan A. Tufts.

Speros Zourides, indicted in Worcester County, August, 1917, for the murder of George Darakes, at Barre, on July 6, 1917. He was arraigned Nov. 14, 1917, and pleaded not guilty. Scott Adams, Esq., and Louis E. Feingold, Esq., appeared as counsel for the defendant. Later the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for a term not exceeding eighteen years nor less than fifteen years. The case was in charge of District Attorney Edward T. Esty.

The following indictments for murder are now pending: —

Pasquale Angotti, indicted in Hampshire County, October, 1917, for the murder of Antonio Angotti, at Northampton, on Aug. 26, 1917. He was arraigned Oct. 18, 1917, and pleaded not guilty. David H. Keedy, Esq., and Thomas R. Hickey, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney John H. Schoonmaker.

Fred Gallerani, indicted in Hampden County, December, 1917, for the murder of Delerosa Gallerani and Clemente Martoni, at West Springfield, on Oct. 11, 1917, and Emelie Gallerani, at Agawam, on Oct. 13, 1917. He was arraigned Dec. 28, 1917, and pleaded not guilty. Frank M. Zottoli, Esq., and Silvio Martinelli, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Joseph B. Ely.

Lincoln M. Grant, indicted in Berkshire County, July, 1917, for the murder of Miles Hewitt, at Pittsfield, on Feb. 26, 1917, and Margaret Hewitt, indicted for being accessory before the fact to the murder of Miles Hewitt. The defendants were arraigned July 26, 1917, and each pleaded not guilty. Robert M. Stevens, Esq., appeared as counsel for the defendant Lincoln M. Grant, and Patrick J. Moore, Esq., appeared as counsel for the defendant Margaret Hewitt. No further action has been taken in this case. The case is in charge of District Attorney Joseph B. Ely.

Michael Hennigan, indicted in Suffolk County, April, 1917, for the murder of Mary Hennigan, on March 10, 1917. He was arraigned April 25, 1917, and pleaded not guilty. On May 31, 1917, the defendant was committed to the Bridgewater State Hospital for observation. The case is in charge of District Attorney Joseph C. Pelletier.

Paul Karpuck, indicted in Hampden County, September, 1917, for the murder of Michael Karpuck, at Russell, on Aug. 27, 1917. He was arraigned Sept. 21, 1917, and pleaded

not guilty. Thomas J. Collins, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Joseph B. Ely.

Antonio LaValle, indicted in Suffolk County, October, 1917, for the murder of Frank Rappello and Marie Sarni, at Boston, on Aug. 27, 1917. The defendant has not yet been arraigned. T. J. Grady, Esq., appeared as counsel for the defendant. The case is in charge of District Attorney Joseph C. Pelletier.

Daniel Manzeiu, indicted in Essex County, September, 1916, for the murder of Yousefka Manzeiu, at Peabody, on Aug. 28, 1916. Sept. 16, 1916, the defendant was committed to the Danvers State Hospital for observation. The case is in charge of District Attorney Louis S. Cox.

George L. Rollins, *alias*, indicted in Suffolk County, March, 1917, for the murder of Ordway R. Hall, at Boston, on Feb. 21, 1917. He was arraigned April 20, 1917, and pleaded not guilty. Herbert L. Baker, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Joseph C. Pelletier.

George L. Rollins, *alias*, and Charles Rollins, indicted in Suffolk County, March, 1917, for the murder of Edward T. Foley, at Boston, on Feb. 17, 1917. They were arraigned April 20, 1917, and pleaded not guilty. Herbert L. Baker, Esq., appeared as counsel for the defendants. No further action has been taken in this case. The case is in charge of District Attorney Joseph C. Pelletier.

Nathan Schwartz, indicted in Suffolk County, December, 1917, for the murder of Emil Knab, at Boston, on Nov. 10, 1917. The defendant has not yet been arraigned. The case is in charge of District Attorney Joseph C. Pelletier.

Stavrous Zaroulas, indicted in Essex County, January, 1917, for the murder of Theodore Mandragouras, at Peabody, on Dec. 9, 1916. He was arraigned Feb. 2, 1917, and pleaded not guilty. Patrick F. Shanahan, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Louis S. Cox.

Grade Crossings.

The following is the report of the work done in connection with the elimination of grade crossings during the year 1917: —

Four hearings before commissions and auditors have been attended.

No construction work has been done during the year.

Statements of expenditures, numbering 3, amounting to $10,865.13, have been examined, and objection to items amounting to $146.51 has been made.

The principal work has been done in connection with the expenditures for the elimination of the grade crossings at Lynn. The engineers of the parties in interest have held many conferences, 37 of which have been attended by the engineer having in charge grade crossings matters for this department. The entire charges have been examined in detail, and an agreement has been reached as to the amount properly apportionable.

Boston & Maine Railroad.

In my report for the year 1916 I brought to the attention of the Legislature the situation in which the Commonwealth was placed by the appointment of a receiver of the Boston & Maine Railroad.

On Aug. 29, 1916, a temporary receiver of the railroad was appointed, and has continued to act as such temporary receiver since that time. On Feb. 26, 1917, a decree on a petition previously filed by the Commonwealth was entered, admitting the Commonwealth as a party to the proceedings. On the same day a memorandum of decision was filed by the court, on the application for the appointment of a perma-

nent receiver, that a receiver ought to be appointed. The decision provided that the complainant might present a decree to that end on due notice to other parties. No decree has ever been entered in accordance with this decision, and the road has continued to be operated by the temporary receiver. The Commonwealth has taken no action toward compelling compliance with this decision and the appointment of a permanent receiver, for the reason that it was represented to me that there was strong probability that an agreement might be arrived at between the Boston & Maine Railroad and its various leased lines for a reorganization of the road properly safeguarding the rights of the Commonwealth. It seemed to both the counsel for the receiver and myself that if a reorganization could be effected within a reasonable time it was better that the temporary receiver should continue to operate the road without the entry of a decree making the receivership permanent, as in the event of a satisfactory reorganization there would be less difficulty in arranging for the discharge of the receivership proceedings, and many other embarrassing complications would be avoided, while at the same time the interests of all parties would be safeguarded.

This position was justified so long as the operation of the railroad resulted in the return of a net income after due allowance for depreciation. The experience of the railroad, however, during the last few months has caused apprehension that this could not be achieved. On the other hand, conditions arising out of the war are such as to make it very improbable that a reorganization on the lines originally proposed can be effected. The situation, therefore, at the time the road was taken possession of by the United States government, on Dec. 28, 1917, by proclamation of the President, was such as to indicate that it would be necessary to make the receivership permanent, and that a liquidation of the railroad would result. Under such liquidation the Commonwealth, without further legislation, would not be in a position to protect its interest in the proceedings. It holds $5,000,000 of bonds of the railroad, acquired in 1900 at the time of the lease of the Fitchburg Railroad to the Boston &

Maine Railroad in exchange for 50,000 shares of the common stock of the Fitchburg Railroad. Upon these bonds there is now due accrued interest amounting to about $225,000. These bonds are unsecured. In order to insure that these bonds and interest will be paid upon any sale of the road, a price necessarily must be realized sufficient to pay at least all outstanding bonds with accrued interest, together with the floating indebtedness.

There are at present outstanding bonds of the Boston & Maine Railroad amounting to $43,338,000. All of these bonds are unsecured, with the exception of $1,000,000 of the Portsmouth, Great Falls & Conway Railroad Company and $1,265,000 of the Worcester, Nashua & Rochester Railroad Company, which are secured by mortgages of the property acquired by the Boston & Maine Railroad from these railroad companies, and $1,919,000 worth of bonds of the Boston & Maine Railroad which are partially secured by a sinking fund. The floating indebtedness amounts to $13,306,060. That a sale of the road might not realize an amount sufficient to pay these obligations in full, under the present financial conditions of the country, is by no means improbable. There is no assurance of the payment of the Commonwealth's claim in full unless some method is provided by which the Commonwealth can appear as a competitor for the purchase of the property of the railroad in the event of a proposed sale by the receiver.

I recommend, therefore, that provision be made authorizing representatives of the Commonwealth to take such steps as may become necessary to protect the interests of the Commonwealth in the disposition of the road and its leased lines. Of course this would include authority to purchase the road and leased lines, with provision for financing the same, and would of necessity impose the obligation of operation until such time as it might be deemed expedient to sell the road to others. I realize that there may be some objections suggested as to the Commonwealth's putting itself in a position that may result in its owning and operating a railroad. On the other hand, I know of no other way that the Commonwealth may be sure of protecting its interests, and

for the Commonwealth to take such a position is not novel. By authority of the following statutes the Commonwealth made loans to the following railroads, and in each instance took a mortgage to secure the loan: St. 1854, c. 266, to the Troy & Greenfield Railroad; St. 1867, c. 321, to the Williamsburg & North Adams Railroad; St. 1868, c. 313, to the Lee & New Haven Railroad.

By St. 1860, c. 202, the terms of the loan to the Troy & Greenfield Railroad were modified and the railroad was required to purchase the Southern Vermont Railroad and to transfer the same to the Commonwealth as security for a loan then made and as additional security for the previous loan. The Southern Vermont Railroad was a railroad lying in Vermont, connecting the Troy & Boston Railroad with the Troy & Greenfield Railroad. On Sept. 4, 1862, the Commonwealth took possession of the Troy & Greenfield Railroad and acquired title to the Southern Vermont Railroad by virtue of the provisions of St. 1862, c. 156, and the Commonwealth completed the Hoosac Tunnel and the Troy & Greenfield Railroad at a total expense of about $17,000,000, and opened them for use about June 30, 1876. From 1876 to 1880 the railroad and tunnel were under the management of a manager appointed by the Governor and Council, the road being used by all connecting railroads upon the payment of tolls prescribed by the Governor and Council. In 1880, by St. 1880, c. 261, contracts were made with the Fitchburg Railroad Company and the New Haven & Northampton Railroad Company for the operation of that portion of the road east of North Adams, and with the Troy & Boston Railroad Company and the Boston, Hoosac Tunnel & Western Railroad Company for the operation of that portion west of North Adams. This continued until 1885, when by an act of the Legislature (St. 1885, c. 297) a consolidation of the Troy & Greenfield Railroad and the Hoosac Tunnel with the Fitchburg Railroad was effected. Under the terms of the consolidation the Commonwealth received 50,000 shares of the common stock of the consolidated company and $5,000,000 worth of bonds, payable in fifty years, and provision was made for the appointment by the Commonwealth

of three of the directors. In 1890 (St. 1890, c. 101) the Governor and Council were authorized to sell and convey the Southern Vermont Railroad to the Fitchburg Railroad Company. Thus from 1876 to 1885 the Commonwealth owned the Troy & Greenfield Railroad and the Hoosac Tunnel, and until 1890, the Southern Vermont Railroad.

By St. 1836, c. 131, the Commonwealth subscribed to the stock of the Western Railroad, and by the same act provided for the election by the Commonwealth of three of the nine directors of the corporation. Furthermore, municipal aid has been authorized by the Legislature to railroad companies by the following statutes: St. 1852, c. 156; St. 1855, cc. 394 and 395; St. 1860, cc. 34 and 184; St. 1861, c. 98; St. 1862, cc. 56 and 78; St. 1863, cc. 96, 104 and 105; St. 1864, cc. 11, 242, 245, 246, 249 and 260; R. L. c. 111, § 49.

Nor does there seem to be any constitutional objection to the acquisition of the Boston & Maine Railroad by the Commonwealth, notwithstanding the fact that certain portions of it lie outside of the boundaries of the Commonwealth. *Railroad Co.* v. *County of Otoe*, 16 Wall. 667. In fact, as appears above, the Commonwealth has in the past owned a railroad outside the Commonwealth.

On the other hand, there are some advantages which can be suggested as to the ownership of the Boston & Maine Railroad, together with the lease of the Fitchburg Railroad to the Boston & Maine Railroad, which in a measure, at least, offset objections to public ownership. The acquisition of the Fitchburg Railroad line would be a concomitant to the development of the port of Boston, undertaken by the Commonwealth, in that it provides a direct connection with transportation lines from the west with the port of Boston, and would probably place a means in the hands of the Commonwealth of insuring the same freight rates between points in the west and Boston as will obtain between the same points and New York. It may be of interest in this connection to note that the principal argument advanced for the construction of the Hoosac Tunnel and the Troy & Greenfield Railroad was that their construction would tend to develop the port of Boston by providing direct

connection with the west. It may be suggested that the action of the United States government in taking possession of the Boston & Maine system removes any difficulties in relation to the Commonwealth being protected. This, in my opinion, is by no means clear. It depends upon many contingencies, the most important of which is the length of the war.

Taxation of Public Service Corporations.

A serious situation has arisen in relation to taxes assessed upon street railways which has brought to my attention the weakness of the provisions of law relative to the collection of taxes assessed upon public-service corporations.

This year a number of street railway companies have failed to pay their State taxes when due. Among these was the Bay State Street Railway Company, from which there was due to the Commonwealth at the time its property was placed in the hands of a receiver, Dec. 12, 1917, by the District Court of the United States for the District of Massachusetts, a corporate franchise tax of $81,467.54, with interest from Oct. 20, 1917. There was also due $225,698.51 to various cities and towns on account of commutation taxes, and taxes amounting to $151,807.10 on property assessed in various cities and towns of the Commonwealth. At the same time there would shortly become due from the company amounts for interest on bonds and rental on leases assumed by the Bay State Street Railway Company upon the consolidation of the Old Colony Street Railway Company and the Boston & Northern Street Railway Company, amounting to $164,542.50, a default in payment of which might result in a disintegration, in part, of the system. In addition to the above there fell due on Jan. 1, 1918, $161,760 for interest upon bonds secured by a mortgage of the Boston & Northern Street Railway Company, and $135,760 for interest due upon bonds secured by a mortgage of the Old Colony Street Railway Company.

It appears from a petition filed by the receiver on Dec. 27, 1917, that the company, prior to the receivership, had taken from its current earnings and applied to the reconstruction

and betterment of its several properties and to the payment of other capital charges an aggregate amount in excess of the amount due on taxes and mortgage interest above referred to, and that, because of the inability of the Bay State Street Railway Company to sell its securities, this amount had never been capitalized or returned to income.

I have felt it my duty to insist, in so far as it lay in my power, that the corporate franchise tax should be paid, or adequate security given for its payment, at the same time, or before, the payment of interest upon the bonds of the Boston & Northern Street Railway Company and of the Old Colony Street Railway Company. The payment of this tax has been resisted by the bondholders. But for the danger of interruption of the service, which would necessarily inconvenience the traveling public, I should have felt it my duty to insist that the tax should be paid by the receiver before any money should be disbursed by him for the payment of any interest or rentals. In my judgment the various cities and towns are justified in taking the same attitude as the Commonwealth in relation to the commutation taxes due to them. If successful this attitude upon the part of the Commonwealth and the cities and towns may result in affecting injuriously, if not altogether wiping out, the equity of the Bay State Street Railway Company.

The means provided for the enforcement of the payment of corporate franchise taxes against public-service corporations is by information brought in the Supreme Judicial Court by the Attorney-General at the relation of the Treasurer and Receiver-General. The court is authorized to issue an injunction upon such information, restraining the further prosecution of the business of the company until the tax is paid. The Treasurer and Receiver-General may also bring an action of contract to recover the same in the name of the Commonwealth or may issue a warrant of distress. The means of collecting the commutation tax assessed on street railways is by suit and execution or distress; and the provisions for collecting local taxes assessed upon public-service corporations are the same as apply to the collection of local taxes generally.

Therefore it is obvious that if a public-service corporation diverts income which should be applied to taxes, and it has no money, and can borrow none to pay the same, the officials charged with the duty of collecting the taxes have no means of collecting them except by taking steps to prevent the corporation from further transacting its business, or by seizing and selling property necessary for the purposes of the business. In other words, the public must go without the taxes or without the public service upon which it depends for its business and comfort.

Sound business judgment would seem to dictate that debts other than those required by law or public safety should not be incurred before the capital is available to meet the debts, and that income required to meet taxes or other obligations due the government should not be diverted to other purposes.

I presume it may be claimed that in many instances the income is not sufficient under the present rates to pay operating and other expenses required by law and public safety, and at the same time reserve sufficient income to meet taxes. If this is so, it is obvious that if the public utility is to be maintained by private capital relief must be obtained in one of two ways, or possibly both, namely, by an increase in the rates or by public aid through the elimination of taxes or some other method. If to pay operating expenses, fixed charges and taxes it is necessary to raise the rates to any very material extent, it seems to me wise to abandon some of the present forms of taxation. This is all the more so because there is a limit to the extent that fares may be raised without causing a reduction instead of an increase in income. In the main there is no more reason for taxing a public utility operated by private capital than if owned and operated by the public, except that it yields a gain to the private capital invested. Nor is it sound, in my opinion, to take the attitude that those who travel upon a street railway are the only members of the public benefited by it, and that therefore the entire burden of its maintenance should be assessed upon them. The life and welfare of the Commonwealth are so interwoven and dependent upon adequate facilities for transportation and travel

that it may well be argued that the general public is so vitally concerned in street railways that they may properly be relieved from substantially all taxation except such as is necessary to equitably distribute the burden upon the communities served.

I am strongly of the opinion, however, that if any action is taken relieving street railways of tax burdens or giving to them other State aid, then the surplus earnings over and above what is necessary to insure a fair return to private capital invested should be turned into the treasury of the Commonwealth, there to be distributed for public purposes as may be deemed expedient.

To prevent the diversion by public-service corporations of income that should be applied to the payment of taxes and other public charges, I recommend that provision be made requiring the setting apart by the corporation of a sufficient reserve to meet said taxes and charges when due. I also recommend that provision be made for a closer supervision of the operation of such corporations and their expenditures. In my judgment there should be limitations placed upon the application of income to purposes that should be provided for by capital, supplementing laws already existing limiting the application of capital to purposes that should be provided for by income. In the larger corporations I believe these results can best be secured by providing for representatives of the Commonwealth, with adequate powers, upon the boards of directors of the corporations. State directors would insure a closer harmony between the corporations and the commissions regulating them, and a more frank disclosure of their conditions and methods of operation. Further, such a provision would tend to assure the public that all the money of the corporations would be devoted exclusively to their legitimate business. Nor do I see how this can be objectionable to the investing public. Such action, in my opinion, would tend to stabilize the value of their securities.

Representation of the Commonwealth upon boards of directors of public-service corporations is not without precedent in this Commonwealth. Such action was taken by the

Commonwealth when it possessed 50,000 shares of the common stock of the Fitchburg Railroad Company, and in the instance of the Western Railroad, where provision was made for the election by the Commonwealth of three of the nine directors of that corporation.

Insurance Receiverships.

During the past year it has become my duty, at the relation of the Insurance Commissioner, to institute proceedings to wind up several insurance companies by application to the Supreme Judicial Court for an injunction against the further prosecution of business, and for the appointment of a receiver to collect the assets and distribute the same to those entitled thereto.

Most of these corporations have been small fraternal benefit societies, having but a few thousand dollars of assets. The almost invariable practice is to appoint some disinterested attorney as receiver. Such a person must spend time in making the investigation invariably necessary for a stranger to familiarize himself with a new business, decide how best to close the affairs of the corporation, and then proceed to do so. The expense for all of this is paid out of the assets. Thus it may frequently happen, in cases where the assets are small, that they are entirely exhausted by the expenses of administration.

In all of these cases the Insurance Commissioner, or his deputies, must have become quite familiar with the affairs of the society in order to reach the conclusion that it should be wound up, and therefore are in a position to do the remaining work of closing up the affairs of the corporation with very little additional exertion. The commissioner is also required at present to audit the accounts of all receivers.

In several States at the present time, notably in New York, the Insurance Commissioner acts as official liquidator in all cases where a receiver is needed.

While I am not prepared at the present time to advise the adoption of the New York practice, I am of the opinion that in small cases, which could be attended to with practically no interference with the regular work of the insurance

department, the court should be free to appoint the Insurance Commissioner, or some deputy, as receiver, without any compensation therefor in addition to his regular salary. There can be little question but that the business of such companies and societies would be more speedily disposed of, and with the elimination of receivers' fees the creditors and members would receive more out of the assets.

Accordingly, I recommend the passage of an act to effect this end.

Tax Collectors.

The efforts made by this department to enforce the provisions of St. 1912, c. 272, relative to actions against tax collectors of cities and towns for failure to make collections and returns within the three-year period have indicated the desirability of more efficient supervision of tax collectors. This statute provides that whenever it shall appear to the Tax Commissioner that at the end of three years taxes remain uncollected, or, if collected, have not been turned over to the treasurer of the city or town, the commissioner shall, unless further delay is deemed expedient, bring suit against such collector on his bond, said action to be prosecuted by the Attorney-General. Each year these reports have been so numerous as to require a large part of the time of one assistant, during the past year more than one hundred cases being reported by the Tax Commissioner. Upon investigation it appears that in some cases the assessors of the cities and towns have refused to abate taxes where abatement was proper, while in others the collectors have failed to issue their warrants for arrest, or to sell real estate as required by law. In many instances it is claimed that the collectors have failed to do their full duty because of their belief that to do so would mean the loss of their office. A collector of taxes ought not to be influenced in the discharge of his duties by fear or favor. His duties are specifically defined by law, and there is room for very little discretion in the performance of those duties.

So long as the Tax Commissioner has been given the responsibility of enforcing the liability of tax collectors upon their bonds, it seems desirable, and I so recommend, that

provision be made authorizing towns at town meetings, and cities by vote of the city council or board exercising the powers of a city council, to provide for the appointment and removal of collectors in their municipalities by the Tax Commissioner. I am of the opinion that such a provision cannot be seriously objected to as an interference with local self-government.

College of Physicians and Surgeons.

This college was given the power to confer the degree of doctor of medicine by St. 1883, c. 153. Complaints have been made at this office that this college is no longer maintained at such a standard as to warrant its being further allowed to grant such degree. Investigation made by the District Police seems to justify the complaints. I therefore recommend that the power to grant degrees of doctor of medicine be taken away from the college. I understand the Board of Registration in Medicine concurs in this view.

Retirement of Veterans of the Civil War.

I renew the recommendation made by me last year, that the provisions of St. 1907, c. 458, § 1, as amended by Gen. St. 1915, c. 95, providing for the retirement from active service of veterans of the Civil War, be amended so as to provide that a veteran who shall be deemed to be incapacitated for active service, and who has been in the service of the Commonwealth at least ten years, shall be entitled to the benefits of the act, notwithstanding the fact that at the time of his application he has ceased to be an employee of the Commonwealth.

District Police.

A petition has been presented to the General Court by the district attorneys of several districts requesting legislation for the separation of the detective department of the District Police from the boiler and inspection department. I understand they feel that better service would be rendered to them in the investigation and preparation of criminal cases by such action. Men trained in the work required should be

available at all times for the needs of the district attorneys. This cannot be accomplished unless they are free to devote their entire time to the work.

I recommend that careful consideration be given to the desires of the district attorneys, and that such legislation be enacted as is necessary to insure a trained force of men who are at all times available for their purposes.

Foreign Corporations.

My attention has been called to the fact that apparently a foreign corporation may maintain a place of business in this Commonwealth without complying with the provisions of our statutes requiring the appointment, in writing, of the Commissioner of Corporations its attorney upon whom all lawful process may be served, and the filing of a copy of its charter and by-laws with the Commissioner, without the officials of such corporation incurring any personal liability. It is true that under the provisions of our statutes the officers of the corporation and agents who transact the business are subject to a criminal penalty, but where the officers are not in the State while the business is being transacted they are probably not subject to this penalty.

I recommend that provision be made making the officers of a foreign corporation which fails to comply with said provisions of law, and its agents transacting its business in this Commonwealth, liable for all the debts and contracts of the corporation contracted or entered into by it while transacting business in violation of our law.

Department of the Attorney-General.

The number of official opinions rendered by the department during the year, up to Jan. 1, 1918, was 183. The number of cases tried in the Probate Court was 13, and 2 cases were tried in the Land Court. The number of cases tried in the Superior Court was 12. Twenty-seven hearings before a single justice of the Supreme Judicial Court have been attended, and there have been 19 cases argued before the Supreme Judicial Court. There have been 4 cases argued before the United States Supreme Court, 1 case before the

Court of Claims, and 4 cases before the United States District Court for the District of Massachusetts. In addition there have been 9 hearings before the Industrial Accident Board of Massachusetts.

The collections of the department amounted to $549,-289.90.

Annexed to this report are such of the opinions rendered during the current year as it is thought may be of interest to the public.

Respectfully submitted,

HENRY C. ATTWILL,
Attorney-General.

OPINIONS.

Public Warehouseman — Definition of.

A department store which has a cold-storage department for the storage of furs of its customers is required to file a bond and procure a license as a public warehouseman, under the provisions of Gen. St. 1915, c. 98, if it makes a charge for such storage or if such storage was not part of the arrangement entered into when the furs were purchased by the customer; otherwise it is not required to do so.

JAN. 25, 1917.

His Excellency SAMUEL W. MCCALL, *Governor of the Commonwealth.*

SIR: — I acknowledge your request for my opinion as to whether or not a department store which has a cold-storage department for the storage of the furs of its customers is required to file a bond and procure a license as a public warehouseman under the provisions of Gen. St. 1915, c. 98.

That act defines a public warehouse and a public warehouseman in the following terms: —

> The words "public warehouse," as used in this chapter, shall mean any building, or part of a building, kept and maintained for the storage of goods, wares and merchandise as a business; and the words "public warehouseman" shall mean any person, corporation, partnership, association or trustees keeping and maintaining a public warehouse as defined in this section.

The warehouse receipts act (St. 1907, c. 582) contains the following definition: —

> "Warehouseman" means a person lawfully engaged in the business of storing goods for profit.

The foregoing definitions are very broad, and, in my opinion, include all persons or corporations engaged in storing any goods, wares or merchandise for profit.

Accordingly, if a department store makes a charge to its customers for the storage of furs, it comes within the provi-

sions of Gen. St. 1915, c. 98, and is required to file a bond and procure a license as a public warehouseman. If such department store is storing furs for its customers without making a charge therefor, or as part of an arrangement entered into when the furs were purchased by the customer, in my opinion it does not come within the provisions of the statute.

Yours very truly,
HENRY C. ATTWILL, *Attorney-General.*

Insurance — Form of Policy — Duty of Insurance Commissioner in approving.

Whether the issuance by an insurance company of a policy of accident insurance containing no provision for cancellation by the company is a violation of St. 1910, c. 493, *quære.*

The fact that the Insurance Commissioner approved the form of such a policy does not constitute evidence either of incompetency or failure to act honestly or in good faith.

JAN. 26, 1917.

His Excellency SAMUEL W. MCCALL, *Governor of the Commonwealth.*

SIR: — You have requested my opinion upon the matters of law raised by reason of objection made to the action of the Insurance Commissioner in approving a certain policy form of accident insurance.

Apparently this form was filed with the commissioner and approved by him under the provisions of St. 1910, c. 493, § 1. It was to be known as a non-cancelable policy, and contained neither in form nor substance the provisions of the clause numbered 8 in said section.

The statute mentioned provides that no policy of accident insurance shall be issued in this Commonwealth until a copy has been filed with the Insurance Commissioner at least thirty days, unless before the expiration of that time he approves it in writing, nor if the Insurance Commissioner notifies the company that in his opinion the form does not comply with the law, nor unless it is in certain form and contains certain provisions. These provisions are set forth in subsections 1 to 9, inclusive.

Section 2 of the act provides that no policy shall be issued if it contains, in substance, certain specified provisions.

Section 7 provides that any company or officer thereof "which issues or delivers in this commonwealth any accident or health policy or contract in wilful violation of the provisions of this act, shall be punished by a fine of not more than five hundred dollars for each offence, . . ."

This statute in substance and form is analogous to provisions of law applicable to life insurance companies and policies which had been in effect for some years. Those provisions have been interpreted by the Supreme Judicial Court, and so far as the enactments are the same, by a familiar rule of construction, the interpretation under the present act would also be the same. In *Ætna Life Ins. Co.* v. *Hardison*, 199 Mass. 181, at 187, Knowlton, C.J., says: —

> Another question is whether the provisions which, in substance, must be inserted in the policy, must appear in a form substantially identical with that given in the statute, or whether it is enough if they contain everything, in meaning and legal effect, that the statute prescribes, and at the same time include other things relating to the same subject, no one of which impairs the force of that which is prescribed for the benefit of the insured. Inasmuch as the ten provisions referred to and the other prescribed parts of the policy were intended for the protection of the policy holder, we are of opinion that, if they are contained in substance in the policy, their form may be varied, and additional provisions beneficial to the insured may be inserted, provided the requirements of the statute are satisfied, and are left undiminished by that which is added.

In *New York Life Ins. Co.* v. *Hardison*, 199 Mass. 190, it was held that a variation from the provisions required by the statute, by inserting terms more favorable to the insured than those prescribed, was permissible, and the action of the Insurance Commissioner in disapproving a policy under those circumstances was held to be erroneous.

The court says, at page 194: —

> No departure from the exact provisions required by the statute should be permitted, unless it is too plain for doubt that the substitution is in every way as advantageous to the insured and as desirable as the prescribed provision.

Other language in the opinion indicates that the examination of the commissioner is to make sure that "everything secured to the insured by the statute is secured by" the language of the policy.

So far as the provisions of this statute were enacted for the sole purpose of protecting the assured, the principles of the foregoing cases would seem to govern.

A decision as to the correctness of the commissioner's ruling, therefore, would depend on a determination of the intent and purpose of the Legislature in the enactment of St. 1910, c. 493. Many of the requirements of this act appear clearly to be in the interest of the policyholder, and to constitute protection against imposition on the assured.

Some of the required terms, however, do not, on their face, indicate such an intention, and no doubt arguments entitled to careful consideration could be made that the clause relating to cancellation is in the interest and for the protection of the company. The language of the statute is as follows: —

> 8. A provision that the policy may be cancelled at any time by the company by written notice delivered to the insured or mailed to him at his last address as shown by the records of the company and the tender of the company's check for the unearned portion of the premium, but that such cancellation shall be without prejudice to any claim arising on account of disability commencing prior to the date on which the cancellation takes effect.

Nevertheless, under this requirement certain protection to the assured is created, in that cancellation can be made only by (1) a *written* notice to the assured, (2) tender of check for the unearned portion of the premium, and (3) without prejudice to any claim on account of disability commencing prior to the date on which cancellation takes effect.

Insurance policies might conceivably contain, and undoubtedly in times past frequently have contained, cancellation clauses containing no such safeguards, and it may be that the Legislature intended, by the enactment of this provision, only to require cancellation clauses, when inserted, to contain at least this much protection to the assured.

A knowledge of the forms of policies issued prior to the enactment of the statute, of the history of the accident and health insurance business, and the conditions surrounding and affecting the same, such as the Insurance Commissioner is especially qualified to possess, would aid in determining the probable intention of the Legislature, and I am not prepared to say that his opinion was erroneous.

It hardly seems to me that a decision of that question is necessary for disposition of the present complaint.

The Insurance Commissioner, by his approval under this statute, confers no substantive rights upon the insurance company. The only effect of the approval is to permit the company to begin issuing policies, if they in fact conform to the law, without awaiting the expiration of the period of thirty days after filing with the commissioner.

If thirty days expire and the commissioner does nothing, the company may then proceed to issue policies, provided they actually do comply with the law. If the commissioner notifies the company that in his opinion the policy does not comply with the requirements of the statute, the company may have the commissioner's opinion reviewed by the Supreme Judicial Court. But even though the commissioner were palpably wrong in his opinion, the company is forbidden to issue the policy until his action shall have been reversed by the court. In other words, the Legislature has placed in the hands of an administrative officer the power of suspending business which seems to him improper, pending a decision by the court. Obviously, this is an important restriction of an important business, to be exercised with discretion and not upon mere suspicion. The court has said: "His duty was to approve of every form of policy that seemed to him correct." (199 Mass. at 197.)

If the approval of the commissioner were a grant of some right, he might well be overcautious in the matter of approval, compelling the companies to take an appeal in all doubtful cases. In the present case, however, the prohibition of the statute remains absolute, regardless of his action, and if the policy is contrary to the terms of the statute, the company, and its agent issuing the same, may be prosecuted in the criminal courts. Any person who feels that the law is being violated can present a complaint to the proper court or district attorney.

In view of the language quoted above, it would not seem that the Insurance Commissioner had acted improperly, even though he were mistaken in his opinion, but that so long as he honestly held the opinion that the policy was lawful he ought not to interfere with the business of a company by disapproving the form.

The issues presented to Your Excellency by such a complaint as this must be based on a charge of incompetency or failure to act honestly or in good faith.

The fact that the commissioner has acted in the manner in-

dicated and approved the form of policy stated does not, in my opinion, constitute evidence of either. Certainly the tendency of the decisions of the Supreme Judicial Court is along the line of this decision rather than contrary to it. His letter to the protestant shows a knowledge of the important cases upon the point, and an intention to make his action comply with those cases and the law, as understood by him. There is no suggestion of improper or corrupt motives.

Accordingly, I do not see that the papers and facts submitted to me call for any action on the part of Your Excellency.

Very truly yours,
HENRY C. ATTWILL, *Attorney-General.*

Tax Returns — Board of Assessors of Everett — Power of Mayor.

While two members of the board of three assessors of the city of Everett remain in office, they are qualified to act as such board, and the mayor of Everett has no power under the city charter to act as an assessor, and consequently has no authority to inspect, under St. 1909, c. 490, pt. I, § 44, so much of the returns of taxpayers filed with the Tax Commissioner as shows the details of the personal estate, except by order of a court.

FEB. 3, 1917.

Hon. WILLIAM D. T. TREFRY, *Tax Commissioner.*

DEAR SIR: — In your letter of Jan. 31, 1917, you ask my opinion as to whether the mayor of Everett may lawfully inspect the returns made to the board of assessors by taxpayers, under the provisions of St. 1909, c. 490, pt. I, § 44. You state that the question arises because one of the members of the board of assessors of Everett has been appointed and has qualified as a deputy to the income tax assessor for the Middlesex district. I assume that the member referred to has resigned from the board of assessors of Everett, as otherwise I do not see how the question would arise.

Said section 44 provides that the lists returned by taxpayers and filed with the Tax Commissioner "shall be open to the inspection of the assessors, their assistants and clerks and to the tax commissioner and his deputy, but so much of the lists as shows the details of the personal estate to that of no other person except by the order of a court."

Section 26 of the charter of the city of Everett (St. 1892, c. 355) is as follows: —

> The mayor shall be the chief executive officer of the city, and the executive powers of the city shall be vested in him and be exercised by him either personally or through the several officers and boards in their respective departments, under his general supervision and control.

This section gives the mayor of the city broad powers. It vests in him the executive power of the city, to be exercised by him either personally or through the several officers and boards in their respective departments, under his general supervision and control. Read literally, this section would seem to give him the power to perform any of the duties imposed upon the several officers and boards in their respective departments at any time, irrespective of the question of whether there were such officers or boards qualified to act. The section, however, must be interpreted reasonably and read in connection with the other provisions of the charter, and with consideration to general statutes applicable to the duties such officers and boards are appointed to perform.

Under section 35 of the charter it is the duty of the mayor to appoint a board of assessors consisting of three persons. The duties of assessors are particularly prescribed by the statutes of the Commonwealth. These statutes, together with the provisions of section 35, negative the idea that the duties of the board of assessors are to be performed by the mayor, if ever, when there is a board of assessors in existence, duly qualified to act.

St. 1913, c. 835, § 408, provides that "there shall be three, five, seven or nine assessors in each city and town, and as nearly one third as may be of the number shall be elected or appointed annually."

The only question that arises, therefore, in my judgment, is whether there is a board of assessors duly qualified to act when one member of three has resigned.

This question seems to be answered by the case of *Cooke* v. *Inhabitants of Scituate*, 201 Mass. 107, in which it was decided by the Supreme Judicial Court that, under a similar statute relating to towns, two members of a board of three assessors were qualified to act as such board after the third member had died.

Accordingly, I am of the opinion that, upon the facts stated by you, the mayor of Everett has no power to act as an assessor, and consequently has no authority to inspect so much of the returns made by taxpayers and filed with the Tax Commissioner as shows the details of the personal estate, except by the order of a court.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Vacancy in Office of County Commissioner — Effect of Death of Person elected before he qualifies.

Where a person who has been elected county commissioner dies before qualifying as required by R. L., c. 20, § 13, such death does not create a vacancy in the board of county commissioners, as the member of the board whose place the deceased was to have taken holds over, under the provisions of St. 1913, c. 835, § 391, until his successor is qualified.

FEB. 5, 1917.

IRVING H. GAMWELL, Esq., *Clerk, County Commissioners for Berkshire County.*

DEAR SIR: — I am in receipt of your letter in which you state that the person who was chosen county commissioner by the voters of Berkshire County at the last annual election died without having taken the oath of office, the member of the board of county commissioners whose place the deceased was to have taken being still alive. You also state that there are two county commissioners other than the persons above referred to, and two associate commissioners, all duly elected and qualified, whose terms of office have not yet expired, and my opinion is requested as to whether there is a vacancy in the board of county commissioners; and if not, of what three persons the membership of the board consists.

St. 1913, c. 835, § 391, provides that county commissioners shall hold office for a term of three years, beginning with the first Wednesday of January in the year succeeding their respective elections, "and until their successors are chosen and qualified." R. L., c. 20, § 13, provides that "county commissioners before entering upon their duties shall be sworn, . . ."

If there had been a failure to elect a county commissioner at the last annual election, a special election under the provisions of St. 1913, c. 835, § 341, would have been necessary.

This section also provides that upon a vacancy in the office of county commissioner a special election shall be had in like manner, and that until such election, in the case of a vacancy, the remaining county commissioners may appoint some person to fill the office until a person is duly elected and qualified.

R. L., c. 20, § 20, relating to associate commissioners, provides that if a commissioner is interested in a question before the board, if he is unable to attend or if there is a vacancy in the board, the other member or members shall give notice to one or both of the associate commissioners, as the case requires, who shall then act as a member or members of the board. I assume that there is in this case no question raised as to the ineligibility of the commissioner on account of interest or his inability to attend.

It is apparent that in this case there was no failure to elect, so that it is necessary that a vacancy exist before a special election can be held or before an associate commissioner may be authorized to act as a member of the board.

Although no case has been decided in this Commonwealth which passes upon the question of whether in the situation here described a vacancy exists, the question has frequently arisen in other jurisdictions, and it has almost uniformly been held that there was no vacancy under provisions of law substantially the same as ours.

In *Commonwealth* v. *Hanley*, 9 Penn. St. 513, Hanley was elected clerk of court in October, 1845, and duly qualified. The Constitution of Pennsylvania provided that such officers should "hold their offices for three years, if they shall so long behave themselves well, and until their successors shall be duly qualified. Vacancies in any of said offices shall be filled by appointments to be made by the governor." On the second Tuesday of October, 1848, one Brooks was duly elected as his successor, but died before qualifying. The Governor, assuming that Hanley's office became vacant at the expiration of the three years, appointed a successor. It was held by the court that the appointment by the Governor was unauthorized and invalid, since there was no vacancy, and that Hanley continued to hold a valid title to the office.

To the same effect are the cases of *State* v. *Metcalfe*, 80 Ohio St. 244; *State* v. *Hayes*, 91 Miss. 755; and *Kimberlim* v. *State*, 130 Ind. 120. In the last case one Tow was duly elected township trustee in 1888 and duly qualified. At the

April election in 1890 Brown and Murray were the opposing candidates for the office. On the day of the election, after the polls were closed but before the result was announced, Brown died. On the completion of the count it was found that Brown was elected. Under the theory that there was a vacancy in the office, an election was held in November, 1890, at which Tow and Kimberlim were the opposing candidates. Kimberlim received a majority of the votes. It was held by the court in this case, which was a proceeding to try the title to the office, that Tow nevertheless continued to hold title to it, since the Constitution provided that whenever the term of any officer was fixed by law "the same shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified;" that there was, therefore, no vacancy to be filled at the November election; and that the election of Kimberlim was invalid. In this case the court says, at page 125: —

> The weight of authority is that, where there exists a constitutional provision such as we are now considering, a term of office fixed by statute runs, not only for the period fixed, but for an additional period between the date fixed for its termination and the date at which a successor shall be qualified to take office. The period between the expiration of the term fixed by statute and the time at which a successor shall be qualified to take office is as much a part of the incumbent's term as the fixed statutory period.

In discussing a similar question the court, in *State ex rel.* v. *Wright*, 56 Ohio St. 540, speaking of the office of mayor, said: —

> His right to serve after the expiration of the designated period, until the qualification of his successor, being conferred by statute at the time of his election, is no less a part of his statutory term of office than is the fixed period itself; and while he is so serving there can be no vacancy in the office in any proper sense of the term, for there is an actual incumbent of the office legally entitled to hold the same.

I beg to advise, therefore, that I am of the opinion that the member of the board of county commissioners of your county who was elected in November, 1913, still remains a legal member of that board, and, accordingly, that there is no vacancy in that office. It follows that an associate commissioner would not be authorized to fill this office on the theory

that a vacancy existed, and that the board of county commissioners of your county now consists of the member elected in 1913, the member elected in 1914 and the member elected in 1915.

I have felt some hesitancy in advising your board upon this question, as there is serious doubt as to whether I am authorized by law to do so. Since, however, in the event that your board should call a special election it would be my duty to advise the Secretary of the Commonwealth as to his duty to prepare ballots therefor, and in view of the importance of the question, I have considered it appropriate in this instance to advise you upon the questions propounded.

Yours truly,

HENRY C. ATTWILL, *Attorney-General.*

Health, Local Board of — Authority of Mayor of Everett to exercise the Powers of.

While there is in the city of Everett no board of health qualified to act, the mayor may, under the charter of that city (St. 1892, c. 355), exercise such powers of the board of health as have been delegated to it by the city, but not such powers as have been conferred by law directly upon that board.

FEB. 7, 1917.

ALLAN J. MCLAUGHLIN, M.D., *Commissioner of Health.*

DEAR SIR: — My opinion is requested upon certain questions propounded to you by the agent of the board of health of Everett. As all these questions are answered by a determination of whether there is at present in the city of Everett a board of health duly qualified to perform the duties imposed upon boards of health, and if not, whether the mayor can act in its place, I think it sufficient to confine my opinion to such determination.

R. L., c. 75, § 9, provides that "in each city except Boston the board of health shall consist of three persons, one of whom shall be a doctor of medicine and no one of whom shall be a member of the city council."

You state in your communication that the mayor of Everett has removed two members of the present board of health, leaving only one member in office. Assuming these removals were legal, I am of the opinion that there is now no board of health in the city of Everett qualified to act as such.

The question arises, therefore, as to whether the mayor of Everett is authorized to perform the duties of the board of health, at least until such time as there is a board of health duly qualified to act.

Section 26 of the charter of the city of Everett (St. 1892, c. 355) is as follows: —

> The mayor shall be the chief executive officer of the city, and the executive powers of the city shall be vested in him and be exercised by him either personally or through the several officers and boards in their respective departments, under his general supervision and control.

This section, together with other provisions of the charter, gives the mayor very broad powers. In my judgment, he has the power to exercise all executive powers of the city delegated to the board of health, at least where there is no such board duly qualified to exercise them.

A distinction should be made in this connection between powers which have been conferred upon the city itself and delegated by it to the officers by whom such powers are to be exercised, and powers which are conferred by law, not upon the city itself but directly upon certain officers. In the latter case the powers exercised by such officers are in no sense derived from the city.

With this distinction in mind it is clear that the powers given to the mayor by the section above quoted include only powers of the first class. While it is true that under another section of the charter the mayor has the power to appoint, with the approval of the board of aldermen, members of the board of health, and to remove them at his pleasure, it by no means follows that the powers which have been conferred upon this board are powers belonging to the city.

As was said by the court in *Johnson* v. *Somerville*, 195 Mass. 370, at page 377, in speaking of a highway surveyor: —

> The highway surveyor is elected by the inhabitants of the town in town meeting. But that does not make him the agent or servant of the town. The election of the highway surveyor no more makes him the servant of the town than does the appointment of the police commissioner of the city of Boston by the Governor by and with the consent of the Council make the police commissioner the agent or servant of the Governor and Council. The way in which the highway surveyor is made highway surveyor, namely, by election in town meeting, is not material. When he is made highway surveyor he is an independent public officer, whose duties and powers are prescribed by statute.

To a large extent the powers of local boards of health are conferred by general statutes of the Commonwealth, and the duties of such boards of health are therein prescribed. When acting under such powers and performing such duties, the members of the board of health act as public officers, that is, as agents of the State and not of the city. *Attorney-General* v. *Stratton*, 194 Mass. 51; *Hathaway* v. *Everett*, 205 Mass. 246; *Haley* v. *Boston*, 191 Mass. 291.

So far as the board of health of the city of Everett acts as a public board, performing duties imposed upon it directly by the State, I am of the opinion that it does not exercise any powers belonging to the city, and that the mayor has no power to perform such duties in its place, whether they are judicial, legislative or executive in their nature. In so far, however, as the execution of powers belonging to the city itself has been delegated by it to the local board of health, I am of the opinion that they may be exercised by the mayor, acting under the charter, at least where there is existing no board of health qualified to act.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Insurance — Reinsurance of "Full Coverage" Automobile Policy — Fire Insurance on Automobile wherever located.

Each of the particular hazards included in a "full coverage" automobile policy may be reinsured in a company authorized to insure against that particular hazard, even though such company is not itself authorized to issue a "full coverage" automobile policy under St. 1907, c. 576, § 32, cl. 2.

Insurance against fire upon movable risks of the sort specified in St. 1907, c. 576, § 32, cl. 2, may be written either by a fire insurance company or by a marine insurance company. If such a policy is written by a fire or fire and marine insurance company it must be in the standard form prescribed by section 60 of this statute, so far as that form is applicable, but if such a policy is written by a marine insurance company it need not be in the standard form prescribed by section 60.

FEB. 19, 1917.

HON. FRANK H. HARDISON, *Insurance Commissioner.*

DEAR SIR: — I acknowledge your request for my opinion as to whether, under the provisions of St. 1907, c. 576, § 20, an insurance company authorized to transact in this Commonwealth the kinds of business specified in clause 2 of sec-

tion 32 of this statute, which issues a "full coverage" automobile policy, must, in case of reinsurance of any of the risks covered by the policy, reinsure only in a company also authorized to do business under clause 2.

Section 20 provides, in part, as follows: —

> If a company authorized to transact the business of insurance in this commonwealth directly or indirectly contracts for or effects any reinsurance of any risk or part thereof taken by it, it shall make a sworn report thereof to the insurance commissioner at the time of filing its annual statement or at such other time as he may request; and such reinsurance unless effected in companies authorized to transact in this commonwealth the class of business reinsured shall not reduce the taxes to be paid by it nor the reserve to be charged to it.

This section must be read in connection with the provision of St. 1909, c. 490, pt. III, § 33, permitting a deduction in determining the premium tax on such a company of "all sums actually paid either to other domestic insurance companies or to the agents of foreign companies for reinsurance on risks, the premium on which, but for such reinsurance, would be liable to taxation."

In my opinion, the words of section 20, "the class of business reinsured," when read together with the above provision of the tax act must be interpreted to refer to the particular subordinate risk or hazard which is being reinsured, and as merely one of the items of the general coverage policy. This language was not intended to be used in the broader sense as referring to the class of business authorized by clause 2, treating that class as an indivisible whole. Thus, in my opinion, when a marine company reinsures the fire or the theft hazard included in a general coverage policy, that action constitutes the reinsurance of fire or theft business within the meaning of this provision. Consequently, such a company may reinsure the fire hazard of such a policy with a company authorized to do business under clause 1 of section 32, and may reinsure the theft hazard of such a policy with a company authorized to do business under clause 11 of that section, and nevertheless be entitled to credit for the premiums paid on such reinsurance under the provisions of section 20 of the insurance law or section 33 of the tax act.

You also ask my opinion as to whether a policy insuring an automobile or other movable personal property, wherever located, against fire only comes within the provisions of clause

1 or clause 2 of section 32 of the insurance statute, and also whether it must be issued upon the Massachusetts standard form under the provisions of section 60.

The clauses of section 32 to which you refer are as follows: —

First, To insure upon the stock or mutual plan against loss or damage to property and loss of use and occupancy by fire; explosion, fire ensuing; explosion, no fire ensuing, except explosion of steam boilers and fly wheels; lightning, hail, or tempest on land; bombardment; a rising of the waters of the ocean or its tributaries, or by any two or more of said causes.

Second, To insure upon the stock or mutual plan vessels, freights, goods, money, effects, and money lent on bottomry or respondentia, against the perils of the sea and other perils usually insured against by marine insurance, including risks of inland navigation and transportation; also to insure against loss or damage to and loss of use of motor vehicles, their fittings and contents, whether such vehicles are being operated or not, and wherever the same may be, resulting from accident, collision or any of the perils usually insured against by marine insurance, including inland navigation and transportation.

Section 60 provides: —

No fire insurance company shall issue fire insurance policies on property in this commonwealth, other than those of the standard form herein set forth, except as follows: [The exceptions are not material.]

In my opinion, a policy of the character to which you refer constitutes insurance "against loss or damage to property. . . by fire." Accordingly, it may be issued by a company authorized to do business only under clause 1, namely, by a fire insurance company. When so issued it clearly comes within the provisions of section 60, and must, accordingly, be issued upon the standard form thus required, with, of course, a waiver of the provisions of the policy requiring the property insured to be located at a specified place.

As I understand it, the peril of loss by fire has always been one of the perils "usually insured against by marine insurance," within the meaning of clause 2. Accordingly, a company authorized to do business only under the provisions of clause 2, since it may insure against loss by fire to the limited extent thus authorized as a part of a general marine policy, may likewise insure to the same limited extent against loss by fire only. It thus may also insure motor vehicles against loss by fire only. Such insurance, however, may only

be written by such companies upon movable risks of the sort specified in clause 2. A company authorized to do business only under the provisions of clause 2 is obviously a marine insurance company and not in any sense a fire insurance company. Therefore, if it issues a policy of the limited sort to which I have referred, insuring against fire only, there is no requirement that such a policy shall be written upon the standard form prescribed by section 60. The requirement of that section applies to fire insurance companies only.

Section 34 of the insurance statute contains the following provision: —

> Any domestic insurance company now or hereafter authorized to transact the business specified in either the first or second clauses of section thirty-two of chapter five hundred and seventy-six of the acts of the year nineteen hundred and seven is hereby authorized to transact the kinds of business specified in both of said clauses: *provided*, that the capital stock of such company is not less than four hundred thousand dollars.

An insurance company authorized under this provision to transact business under either clause 1 or clause 2 is called by various provisions of the statutes a fire and marine company. It is thus subject to the limitations imposed upon both such companies. In my opinion, if such a company issues a policy insuring an automobile or other movable personal property, wherever located, against fire only, it must issue that policy upon the standard form in accordance with the requirements of section 60. Such company, being both a fire and a marine company, is subject to the limitations imposed by law upon both such companies.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Taxation — Property devoted to a Public Use.

A town may not legally assess taxes upon a water district on account of water mains extended outside the territorial limits of that district and into the limits of such town.

FEB. 19, 1917.

Hon. WILLIAM D. T. TREFRY, *Tax Commissioner.*

DEAR SIR: — I acknowledge your request for my opinion as to whether the assessors of the town of Oxford may legally

assess taxes upon the Cherry Valley and Rochdale water district on account of water mains extended outside the territorial limits of that district and into the town of Oxford.

By St. 1910, c. 381, the inhabitants of this district, a certain specified portion of the territory of the town of Leicester, were created a municipal corporation for the purpose of supplying themselves with water, and were given the power to raise money by taxation and other similar powers usually granted to such corporations. By section 7 of this statute the district was authorized to extend its pipes into the town of Oxford for a distance not exceeding 500 feet from the boundary lines between the towns of Leicester and Oxford, and by St. 1911, c. 152, this distance was increased to 4,000 feet.

It is well settled that property devoted to a public use is exempt from taxation, in the absence of any express provision of law authorizing its taxation. Accordingly, it is held that property owned by one town for the purposes of a water supply and located within the territorial limits of another is exempt from taxation. *Wayland* v. *Middlesex County Commissioners*, 4 Gray, 500. It is also held that, in the absence of any provision of law to the contrary, the property of a private water company is exempt from taxation. *Milford Water Company* v. *Hopkinton*, 192 Mass. 491. It is now provided by St. 1909, c. 490, pt. I, § 11, that the real estate and machinery of every private water company shall be subject to taxation. By section 8 of this statute it is also provided that a city or town owning property in another city or town for the purpose of a water supply shall annually pay to the city or town in which the property lies "an amount equal to that which such place would receive for taxes upon the average of the assessed values of such land, without buildings or other structures, for the three years last preceding the acquisition thereof."

So far as I am aware, there is no provision of law for the taxation of property, real or personal, owned by a water district and located within the limits of another city or town from that in which the district is situated. Such a district is not a private water company, and therefore section 11 does not apply to it. Such a district is not a city or town, and thus section 8 does not apply to it. Furthermore, the payment provided for by section 8 is based only upon the assessed values of land located in the other city or town. The

payment there provided for is based in nowise upon personal property.

The pipes laid by this water district within the limits of the town of Oxford are plainly personal property. I find no provision of law authorizing the town of Oxford to tax them, and, accordingly, I am of opinion that they are not subject to taxation by that town. In my opinion, it is proper for you to advise the assessors of the town of Oxford that they should abate any such taxes heretofore assessed which remain uncollected, and that they should omit to assess such taxes in the future.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Constitutional Law — Constitutional Convention — Incompatibility of Offices.

The position of delegate to the Constitutional Convention provided for by Gen. St. 1916, c. 98, is a "place under the authority of the commonwealth" which the Governor, Lieutenant-Governor and justices of the Supreme Judicial Court are precluded from holding by Mass. Const., pt. 2d, c. VI, art. II.

The position of delegate to the Constitutional Convention is not an "office under the government of this commonwealth" within the meaning of article XIII of the Amendments to our Constitution, and the holding of the office of justice of any court of the Commonwealth, other than the Supreme Judicial Court, is not incompatible with the holding by the same person of the position of such delegate.

Members of the General Court, councillors, officers of the Commonwealth, other than Governor and Lieutenant-Governor, elected by vote of all the people, and senators and representatives from this Commonwealth in the Congress of the United States are eligible under our Constitution to hold the position of delegate to the Constitutional Convention provided for by Gen. St. 1916, c. 98.

FEB. 19, 1917.

Joint Committee on Constitutional Amendments.

GENTLEMEN: — You request my opinion upon the following questions: —

1. Are any or all of the officers mentioned in House Bill No. 795 now ineligible to membership in the Constitutional Convention provided for by chapter 98 of the General Acts of the year 1916?

2. If any or all of said officers are ineligible, is it within the power of the Legislature to make such officers eligible to membership in the convention?

The officers mentioned in this bill are the members of the General Court, the Governor, Lieutenant-Governor, councillors, the justices of the Supreme Judicial and the Superior Courts, the justices of all other courts in this Commonwealth, any officer of the Commonwealth elected by vote of all the people, and senators and representatives from this Commonwealth in the Congress of the United States.

Mass. Const., pt. 2d, c. VI, art. II, provides that —

> No governor, lieutenant-governor, or judge of the supreme judicial court, shall hold any other office or place, under the authority of this commonwealth, except such as by this constitution they are admitted to hold, saving that the judges of the said court may hold the offices of justices of the peace through the state; nor shall they hold any other place or office, or receive any pension or salary from any other state or government or power whatever.

If the convention called to revise, alter or amend the Constitution pursuant to the vote of the people at the last annual election, under Gen. St. 1916, c. 98, is authorized by the provisions of our present Constitution, the position of a delegate to the convention is a "place under the authority of the commonwealth," and it follows that the Governor, Lieutenant-Governor and justices of the Supreme Judicial Court would be violating the provisions of the Constitution by sitting in said convention.

It has been asserted by many, and seems to have been the opinion of the justices of the Supreme Judicial Court in an opinion to the Legislature (reported in 6 Cush. 573), that article IX of the Amendments to the Constitution, providing a method for the adoption of specific and particular amendments to our Constitution, excluded by implication any authorization to the people to revise or change it by the convention method, and this view is not unsupported by other authority. *Opinion of the Justices*, 14 R. I. 649.

The Preamble to our Constitution recites that —

> The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights, and the blessings of life: and whenever these great objects are not obtained the people have a right to alter the government, and to take measures necessary for their safety, prosperity, and happiness.

Article VII of the Bill of Rights of our Constitution is as follows: —

> Government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity, and happiness require it.

This incontestable, unalienable and indefeasible right, which indeed is the essence of a republican form of government, cannot, in my judgment, be taken away except by plain and unmistakable language. That the people of one generation can deprive the people of a succeeding generation of their unalienable right to reform, alter or totally change their form of government, except in a restricted manner, when their protection, safety, prosperity and happiness require it, is repugnant to our theory of government, that the right to govern depends upon the consent of the governed. It seems to me a much more reasonable if not a necessary construction of the Constitution to hold that article IX of the Amendments provides only a manner of amending the Constitution in addition to other methods that may be adopted by the people of changing their form of government, under the fundamental right guaranteed by the Bill of Rights, whenever "their protection, safety, prosperity, and happiness" require it.

This view is strengthened by an examination of the debates in the convention of 1821, which framed this article of amendment for submission to the people. Mr. Webster, in discussing this article at that time, said that he knew of no principle that could prevent a majority, even a bare majority, of the people from altering the Constitution, and that the object of the mode proposed for making amendments in it was to prevent the people from being called upon to make trivial amendments or any amendments except when a real evil existed. Debates in Convention of 1820 (ed. 1853), 407; Jameson, Const. Conventions, §§ 571–575.

Accordingly, I am of the opinion that the convention will be held under the authority of the Commonwealth, that the position of a delegate to said convention is a place under the authority of the Commonwealth, and that therefore the

Governor, Lieutenant-Governor and justices of the Supreme Judicial Court cannot sit therein as delegates without violating the provisions of Mass. Const., pt. 2d, c. VI, art. II. It is unnecessary, however, to determine whether the position of a delegate is a place under the authority of the Commonwealth, as it will be noted that the prohibition contained in Mass. Const., pt. 2d, c. VI, art. II, is not limited to places under the authority of the Commonwealth, but includes all places, at least of a public nature; and thus I am of the opinion that whatever view is adopted as to the nature of the convention, the Governor, Lieutenant-Governor and justices of the Supreme Judicial Court, while occupying their respective offices, cannot properly sit as delegates therein.

Your specific question is as to their eligibility. Doubtless they are eligible to be candidates, and may hold the position of delegate subject to the provision of Gen. St. 1916, c. 98, § 6, that the delegates "shall be the judges of the returns and elections of their own members."

It was held by the Supreme Judicial Court in the case of *Commonwealth* v. *Hawkes*, 123 Mass. 525, that a person holding the office of judge might lawfully hold a seat in the Legislature, the acceptance of such seat, however, being a resignation of his office as judge.

Accordingly, it would seem that while the Governor, Lieutenant-Governor and justices of the Supreme Judicial Court might lawfully hold a seat in the convention if elected thereto, the acceptance of such seat would operate as a resignation of their office or would render them liable to impeachment. In arriving at this conclusion I have not overlooked the fact that His Honor William Phillips, then Lieutenant-Governor, and Hon. Isaac Parker, then chief justice, and Hon. Samuel S. Wilde, a justice, of the Supreme Judicial Court, sat as delegates in the Constitutional Convention of 1820. Their right to do so does not appear to have been questioned at that time.

The only provision in the Constitution that can be construed as a prohibition to the judges of the Superior Court and the other courts of the Commonwealth sitting as delegates in the convention is contained in article VIII of the Amendments, which provides that —

> Judges of the courts of common pleas shall hold no other office under the government of this commonwealth, the office of justice of the peace and militia offices excepted.

There is some question whether the phrase "courts of common pleas" refers to the courts which were established at the time of the adoption of this amendment under that name, or whether it has a much broader meaning, including all courts having jurisdiction of common pleas.

Bouvier defines "common pleas" as —

> The name of a court having jurisdiction generally of civil actions.
>
> Such pleas or actions are brought by private persons against private persons, or by the government when the cause of action is of a civil nature. In England, whence we derived this phrase, common pleas are so called to distinguish them from pleas of the Crown.

I think it unnecessary to consider this question, as I have come to the conclusion, with some hesitation, that the position of delegate in the convention is not an office of the Commonwealth, within the meaning of this amendment. It is to be observed that the phrase here is "office under the government of this commonwealth," whereas the phrase contained in the provision relative to the justices of the Supreme Judicial Court is "office or place under the authority of this commonwealth." The language used in connection with the justices of the Supreme Judicial Court is much more comprehensive than that used in relation to the judges of the courts of common pleas.

In some jurisdictions a clear distinction has been made between "office" and "place" under the government. *Worthy* v. *Barrett*, 63 N. C. 199. In that case it was said that a member of the Legislature was not an officer although he held a place of trust and profit. On the other hand, in *Morrill* v. *Haines*, 2 N. H. 246, it was held that a member of the Legislature was an officer of the State. No case has occurred in this Commonwealth where this question has been decided. In the case of *Fitchburg R.R. Co.* v. *Grand Junction R.R. etc. Co.*, 1 Allen, 552, the question was raised, but the court, in arriving at its conclusions, found it unnecessary to determine the point and expressly left it open.

Whatever may be said in relation to a member of the Legislature, he at least takes part in the execution of one of the powers of government, whereas a delegate in the convention acts substantially as one of a committee of the people, whose power is restricted to making a report to the people.

The whole purpose of the convention is to take under con-

sideration the propriety of revising or altering the present Constitution, and to report back to the people such revision, alteration or amendment as it may propose. Its powers are similar to that of a committee, its work is entirely preliminary, and it has no power to do any act which of itself has any final effect.

It is my view that the word "office," as used in article VIII of the Amendments, refers to a position the incumbent of which exercises some power of government, and not to the position of a person selected to act in an advisory capacity in framing a scheme or change of government to be submitted to the people for adoption or rejection. See in this connection *Attorney-General* v. *Tillinghast*, 203 Mass. 539, 543.

Accordingly, I am of the opinion that there is nothing in our Constitution which renders the office of justice of any court of the Commonwealth, other than the Supreme Judicial Court, incompatible with the position of delegate to the constitutional convention, or which in any way affects his eligibility to such position.

As to the other officers referred to in your inquiry, the only provision of the Constitution which might be said to apply thereto is clause 2 of article II of chapter VI of part the second, which reads as follows: —

> . . . and never more than any two offices, which are to be held by appointment of the governor, or the governor and council, or the senate, or the house of representatives, or by the election of the people of the state at large, or of the people of any county, military offices, and the offices of justices of the peace excepted, shall be held by one person.

This would apply, if at all, only to such delegates as were elected at large. Even then I am of the opinion that this clause would have no application, since what I have before said in relation to an "office" as distinguished from a "place" applies with equal force to this provision of the Constitution.

The only statutory provision that in any way applies to the questions propounded by you is R. L., c. 18, § 11, which prohibits any person from receiving more than one salary at the same time from the treasury of the Commonwealth.

I am informed that House Bill No. 26, which provides that this section shall not apply to the position of delegate to the convention, has been favorably reported by your committee. There is, of course, no constitutional objection to the enact-

ment of this bill, and if enacted into law I am of the opinion that there is nothing in the Constitution or laws of the Commonwealth which in any way interferes with such officers sitting as delegates in the Constitutional Convention.

As to your second question, since the offices of Governor, Lieutenant-Governor and justice of the Supreme Judicial Court are incompatible with the position of delegate in the convention, by reason of the provisions of the Constitution itself, it is obvious that the Legislature has no power to remove the incompatibility. The other officers mentioned in your bill are, in my opinion, already eligible to seats as delegates in the convention, at least if House Bill No. 26 is enacted into law, so there seems to be no occasion for the enactment into law of any of the provisions of House Bill No. 795.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Constitutional Law — Office of District Attorney — Power of General Court to provide for Investigation of.

Under Mass. Const., pt. 2d, c. I, § I, art. IV, the General Court has the power to prescribe and determine the methods and basis for the entry of *nolle prosequi* and filing of criminal cases by a district attorney, and for that purpose it may provide for the appointment of a commission to investigate as to what has been done in the past in this regard in a particular district, this power being in no way limited by article XIX of the Amendments to the Constitution.

MARCH 8, 1917.

Hon. JAMES F. CAVANAGH, *Chairman, Joint Committee on the Judiciary.*

DEAR SIR: — I acknowledge receipt of your letter requesting my opinion as to the right of the Legislature to enact legislation substantially in accordance with Senate Bill No. 136, entitled "A Resolve providing for an investigation of the office of the district attorney of Suffolk County." I assume the office referred to is that of district attorney for the Suffolk district, as there is no office of district attorney of Suffolk County in this Commonwealth.

The resolve provides for the appointment by the Governor of a commission of three persons for the purpose of investigating the office of the district attorney of Suffolk County, "to determine the methods and the basis for the nol-prossing and

filing" of criminal cases. The commission is given power to summon witnesses and is required to report to the General Court.

By Mass. Const., pt. 2d, c. I, § I, art. IV, the General Court is given —

> Full power and authority . . . to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof; and to name and settle annually, or provide by fixed laws for the naming and settling, all civil officers within the said commonwealth, the election and constitution of whom are not hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits, of the several civil and military officers of this commonwealth, and the forms of such oaths or affirmations as shall be respectively administered unto them for the execution of their several offices and places, so as the same be not repugnant or contrary to this constitution. . . .

Under this authority the Legislature has undoubted power to change or regulate the powers and duties of the office in question, or even to abolish it, unless limited in this respect by some other provision of the Constitution. The only other provision of the Constitution touching this particular question is article XIX of the Amendments, which provides as follows: —

> The legislature shall prescribe, by general law, for the election of sheriffs, registers of probate, and clerks of the courts, by the people of the several counties, and that district-attorneys shall be chosen by the people of the several districts, for such term of office as the legislature shall prescribe.

In pursuance of this amendment, which was ratified by the people in 1855, St. 1856, c. 173, was enacted, providing for the election and the term of office of the officers specified in the article of amendment.

The effect of this article was considered by the justices of the Supreme Judicial Court in an opinion given to the House of Representatives under date of April 20, 1875, reported in 117 Mass. at page 603, in which the question of whether the

office of register of probate and insolvency could lawfully be abolished by the Legislature was answered in the affirmative. Referring to the amendment in question, the justices say: —

> The Constitution does not secure the tenure of office of registers of probate, nor confer any right in the office beyond the control of the Legislature, but merely ordains how such officers shall be elected. It is within the constitutional authority of the Legislature, by general law, to change the term of office, or to abolish the office itself, and transfer the powers and duties thereof to another. . . .

The original statute of 1856, chapter 173 (now R. L., c. 156, § 4), provides for the removal of these officers by a majority of the justices of the Supreme Judicial Court. This provision for removal apparently was assumed to be constitutional in the case of *Bullock* v. *Aldrich*, 11 Gray, 206, and a removal from the office of district attorney for the Suffolk district was made thereunder in the case of *Commonwealth* v. *Cooley*, 1 Allen, 358.

It is my opinion, therefore, that the power of the Legislature over the office in question is not impaired or diminished by the nineteenth article of amendment, except as to the manner in which it shall be filled. It follows that it is within the proper sphere of the Legislature to prescribe and determine, if it deems it desirable, the methods and basis for the entry of *nolle prosequi* and filing of criminal cases by a district attorney.

It may be that the Legislature believes that it can obtain assistance in determining the wisdom of the passage of laws to regulate or restrict the disposition of criminal cases by filing or the entry of *nolle prosequi* by ascertaining the nature, number and cause of the disposition of such cases in this manner in the past. Nor does the fact that the investigation is limited to one district alone affect the constitutionality of the resolve. Whether the wisdom of limiting the power long exercised by prosecuting attorneys can as well be determined by the investigation of the disposition of cases in only one district as by an investigation of this subject throughout the Commonwealth, is a matter for the Legislature itself to determine.

It is my opinion that the Legislature is not restricted in obtaining this information to committees made up of its own members, but that it may provide for the appointment of such

a commission as is proposed for the purpose of investigating this matter and reporting to the Legislature.

As to how far the commission may go in requiring the district attorney, or his assistants, to disclose confidential communications or other matter which may be privileged, it is unnecessary for the purpose of your question to determine.

Accordingly, the answer to your question must be in the affirmative.

Yours truly,

HENRY C. ATTWILL, *Attorney-General.*

Registrars of Voters — Power of Assistant City Clerk to act as Member of in Place of City Clerk.

Where a city has not adopted the provisions of St. 1913, c. 835, § 24, the city council is not authorized, under R. L., c. 26, § 16, to provide by ordinance that the assistant city clerk shall perform the duties of registrar of voters in place of the city clerk when the clerk is unable personally to perform such duties.

MARCH 21, 1917.

Hon. ALBERT P. LANGTRY, *Secretary of the Commonwealth.*

DEAR SIR: — You have requested my opinion upon the following question: —

The city clerk of the city of Gloucester is a member of the board of registrars, under the provisions of St. 1913, c. 835, § 25. The city is about to adopt or has adopted an ordinance which will impose upon the assistant city clerk the performance of all duties pertaining to the office of city clerk when the city clerk is absent.

Would this, in your opinion, give the assistant city clerk the power to register voters in the absence of the city clerk?

St. 1913, c. 835, §§ 24 to 33, inclusive, relate to registrars of voters, their appointment, terms of office, etc. In cities which have adopted the provisions of section 24 the board of registrars shall consist of four persons appointed by the mayor and aldermen, whose terms of office shall be for four years. In such cities the city clerk ceases to be a member of the board of registrars. Under section 25 cities which have not adopted the provisions of this section shall have an appointive board of three members, who shall act with the city clerk, and the terms of office of the appointive members shall be for three

years. By both these sections provision is made for equal political representation.

The following sections provide for the filling of vacancies and appointment of assistant registrars, and define their duties: —

Section 29. If a member of the board of registrars shall be disabled by illness or other cause from performing the duties of his office, or shall, at the time of any meeting of said board, be absent from the city or town, the mayor or selectmen may, upon the request in writing of a majority of the remaining members of the board, appoint in writing some person to fill such temporary vacancy, who shall be of the same political party as the member whose position he is appointed to fill. Such temporary registrar shall perform the duties and be subject to the requirements and penalties provided by law for a registrar of voters.

. . . . . .

Section 32. A city council, except in the city of Boston, may authorize the registrars to appoint assistant registrars for the term of one year, beginning with the first day of October, unless sooner removed by the registrars, and they shall, as nearly as may be, equally represent the different political parties.

Section 33. The registrars in a city authorizing the appointment of assistant registrars may cause the duties devolving upon a single registrar to be performed by one or two assistant registrars, and they may designate two assistant registrars, so far as practicable of different political parties, for the sessions required by law to be held outside of their principal office. The registrars shall make suitable regulations for the government of the assistant registrars, whose doings shall be subject to their revision and acceptance. Assistant registrars shall be subject to the same obligations and penalties as registrars. Registrars may remove an assistant registrar, and may fill any vacancy in the number of assistant registrars for the remainder of the term.

R. L., c. 26, § 16, provides for the appointment of assistant city clerks, and is as follows: —

A city may by ordinance establish the office of assistant city clerk, and prescribe the manner of his appointment and his powers and duties. His certificate or attestation shall have the same effect as that of the city clerk.

If I am correct in the assumption that the city of Gloucester has not adopted the provisions of section 24, above quoted, then the city clerk is a member of the board of registrars of voters. The statute makes him a member of the board. No special provision is made as to who shall act in his

absence, and it seems clear that the provisions of section 29 apply to a temporary vacancy caused by his disability to serve.

The question is, therefore, Do the provisions of R. L., c. 26, § 16, authorize the city council by ordinance to provide that the assistant clerk shall act in the place of the clerk when he is unable to perform the duties of registrar? In my opinion they do not. The provisions of said section 16 were originally passed in 1869, and, as then passed, provided that the assistant city clerk "shall be appointed in such manner and for such duties and powers now belonging to the office of city clerk as such ordinance shall prescribe and determine." The office of registrar of voters was not established until the passage of St. 1881, c. 210. Prior to that time the powers now exercised by registrars of voters were exercised in cities by the mayor and aldermen and in towns by the selectmen. It seems plain that at the time of the original passage of the statute authorizing the establishment of the office of assistant city clerk the duties and powers now exercised by the board of registrars were in no sense duties and powers belonging to the office of city clerk.

It is my view that the statutes establishing boards of registrars created a distinct office from that of city clerk, and imposed upon the city clerk, in certain instances, the duty of exercising the powers of said office, and in no way enlarged the authority given a city in prescribing the powers and duties of an assistant city clerk under the provisions of R. L., c. 26, § 16. Furthermore, the statutes provide methods for the filling of vacancies and the appointment of assistant registrars. (§§ 29, 32 and 33.) Ordinarily, when a specific method of appointment to office is provided by statute it excludes other methods of appointment, unless they are specifically provided for by statute.

It should also be noted that the statute provides for equal political representation, as near as may be, on the board of registrars of voters. As it is possible for the clerk and assistant clerk to be of different political parties, an ordinance of the city which provides that the assistant clerk shall act as registrar of voters in the absence of the clerk might nullify the provision for equal political representation.

Accordingly, I am of the opinion that your question is to be answered in the negative.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Cities and Towns — Hospitals for Consumptives — State Subsidy — County Tuberculosis Hospitals.

Since the passage of Gen. St. 1916, c. 286, the city of Everett, being of less than 50,000 population, is no longer required to make hospital provision for consumptive persons, but until the completion of the county hospitals provided for by that statute, that city is entitled to receive from the Commonwealth $5 per week for each patient who is unable, or whose kindred are unable, to pay for his support, and who is maintained by that city under the conditions specified in St. 1912, c. 637, in the Cambridge Tuberculosis Hospital.

March 28, 1917.

Trustees of Hospitals for Consumptives.

Gentlemen: — I acknowledge receipt of your letter requesting my opinion upon the question of whether the city of Everett was acting within its rights in closing the hospital which it had heretofore erected for its tuberculosis patients, as bearing upon the further question of whether the city of Everett is entitled to a subsidy from the Commonwealth for its consumptive patients cared for at the Cambridge Tuberculosis Hospital under an arrangement with that city.

R. L., c. 75, § 35, as amended by St. 1906, c. 365, and by St. 1911, c. 613, provides that each city and town shall establish and constantly maintain within its limits one or more isolation hospitals for the reception of persons having certain diseases, including tuberculosis.

St. 1911, c. 597, provided that every city or town which establishes and maintains a tuberculosis hospital shall be entitled to receive from the Commonwealth a subsidy of $5 per week for each patient who is unable, or whose kindred are unable, to pay for his support.

St. 1912, c. 151, exempted from the obligation to establish and maintain tuberculosis hospitals such cities and towns as make an arrangement satisfactory to the State Department of Health with a neighboring city or town for the care of persons having such disease.

By St. 1912, c. 637, the right to the State subsidy was extended to cities and towns which placed their patients suffering from tuberculosis in a municipal or incorporated tuberculosis hospital in this Commonwealth, or in a building or ward set apart by such hospital for patients suffering from this disease. This act has been amended in other respects by Gen. St. 1916, cc. 57 and 197, but these later amendments have no bearing upon the present question.

Until the enactment of Gen. St. 1916, c. 286, the city of Everett was bound by law to make hospital provision for its tuberculosis patients, either by maintaining a hospital of its own for that purpose or by making an arrangement satisfactory to the State Department of Health with a neighboring city or town for their care. This act, however, providing for the establishment of county tuberculosis hospitals, expressly repeals so much of R. L., c. 75, § 35, and the amendments thereof, as required cities and towns having less than 50,000 population to make hospital provision for tuberculosis patients. Since the city of Everett has a population of less than 50,000, it is obvious that it is no longer under any obligation to make hospital provision for its consumptive patients, and, accordingly, the answer to your question must be in the affirmative.

The question of whether the city of Everett is entitled to receive a subsidy from the Commonwealth for its patients maintained in the Cambridge Tuberculosis Hospital under contract with that city depends upon whether said chapter 286 had the effect of repealing prior laws in relation to such subsidy. I am informed that no county tuberculosis hospital has as yet been erected in Middlesex County under the provisions of this act. Section 4 of this chapter provides that cities having more than 50,000 inhabitants, and also cities and towns having less than 50,000 inhabitants but already possessing and continuing to furnish adequate tuberculosis hospital provision, shall be exempt from the provisions of the act, and shall not be required to pay any part of the county tax which is assessed in order to comply with its provisions.

If the city of Everett, having already established a tuberculosis hospital, had continued to maintain it, it is clear that no question could be raised but that the city would be entitled to receive the subsidy provided for by the statutes of 1911 and 1912. It is also clear that after the completion of the county hospitals provided for by this act the city of Everett will not be entitled to receive any subsidy, except under the provisions of Gen. St. 1916, c. 286, § 12, for its patients which are supported in the county hospital. The difficulty is whether the city of Everett, being released by this later act from its obligation to make any provision for tuberculosis patients other than in the county hospitals provided for therein, is entitled to receive from the State a subsidy for such patients maintained by it in the manner described.

The act of 1916 contains no express repeal of the laws then

existing relating to State subsidies. It does, however, contain a provision for the payment of subsidies under certain conditions to cities and towns for the support of their patients in hospitals provided for under that act, and, in so far as this provision is inconsistent with former acts, they are, under the general rule of statutory construction, thereby repealed. This subsidy is of necessity not available until the completion of the hospitals contemplated by the act, and I am of opinion that it was not the intention of the Legislature to repeal the former laws relating to subsidies to cities and towns coming within the act until the time therein fixed for the completion of said hospitals, or their actual completion before that time.

Accordingly, I am of the opinion that the city of Everett is entitled to a subsidy from the Commonwealth for the tuberculosis patients maintained by it in the Cambridge Tuberculosis Hospital under the conditions specified in St. 1912, c. 637, as amended, provided this arrangement between the city of Everett and the city of Cambridge is satisfactory to the State Department of Health.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Intoxicating Liquors — Sale to Minor — Sixth-class Licenses — Certificates of Fitness.

The sale of intoxicating liquor upon a physician's prescription to a minor by a druggist operating under a sixth-class license would be a violation of the conditions of such license. Such a sale by a druggist operating under a certificate of fitness, as provided by St. 1913, c. 413, would subject him to the penalties prescribed by R. L., c. 100, § 62, and would constitute sufficient cause for the revocation of the certificate of fitness by the Board of Registration in Pharmacy.

MARCH 28, 1917.

Board of Registration in Pharmacy.

GENTLEMEN: — I acknowledge the receipt of your communication in which you request my opinion as to whether intoxicating liquor or alcohol may be sold on a physician's prescription to a minor by a druggist operating under a sixth-class license, or by a druggist operating under a certificate of fitness issued under the provisions of St. 1913, c. 413.

By R. L., c. 100, § 17, par. 4, it is made a condition of every license —

That liquor shall not be sold or delivered on the licensed premises to a person who is known to be a drunkard, to an intoxicated person, or to a person who is known to have been intoxicated within the six months last preceding, or to a minor.

These provisions apply alike to all classes of licenses, and therefore a druggist operating under a sixth-class license cannot sell intoxicating liquor to a minor upon a physician's prescription without violating the conditions of his license.

As to a druggist operating under a certificate of fitness issued under the provisions of St. 1913, c. 413, there appears to be no law which prohibits his making such sale to a minor. It is to be noted, however, that a druggist who makes such sale will subject himself to liability under the provisions of R. L., c. 100, § 62, while a druggist operating under a sixth-class license who makes such sale is not subject to the provisions of this section. I am of the opinion, however, that the making of such sale by a druggist operating under a certificate of fitness would be sufficient cause for the revocation of his certificate of fitness by your Board, under the provisions of St. 1913, c. 413, § 2.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Credit Unions — Powers of — Security required for Loans.

Credit unions incorporated under Gen. St. 1915, c. 268, may loan money to its members upon mortgages of real estate generally, and the sufficiency of the property mortgaged is left entirely to the discretion of the credit committee, under the provisions of section 17 of this act, except as to loans secured by mortgages upon farm lands, which are restricted by section 18 of this statute to 50 per cent. of the value of the property pledged.

A credit union may not loan money to a person not a member of that union.

APRIL 3, 1917.

Hon. AUGUSTUS L. THORNDIKE, *Bank Commissioner.*

DEAR SIR: — You have requested my opinion as to whether credit unions incorporated or doing business under the authority of Gen. St. 1915, c. 268, are authorized to loan money upon mortgages of real estate other than farm lands, and if so, whether there is any limitation upon the amount of such loans.

Gen. St. 1915, c. 268, contains the following pertinent provisions: —

Section 2. Seven or more persons, resident in this commonwealth, who have associated themselves by an agreement in writing with the intention of forming a corporation for the purpose of accumulating and investing the savings of its members and making loans to members for provident purposes, may . . . become a corporation . . .

. . . . . .

Section 5. A credit union may receive the savings of its members in payment for shares or on deposit; may lend to its members at reasonable rates, or invest, as hereinafter provided, the funds so accumulated; and may undertake such other activities relating to the purpose of the association, as its by-laws may authorize, any provisions in section one of chapter one hundred and fourteen of the Revised Laws notwithstanding.

. . . . . .

Section 8. All property of a credit union, *except real estate*, and all capital stock in a credit union shall be exempt from state and local taxation, except legacy and succession taxes.

. . . . . .

Section 11. The capital, deposits and surplus funds of a credit union shall be invested in loans to members with the approval of the credit committee as provided in section seventeen of this act, and any capital, deposits or surplus funds in excess of the amount for which loans shall be approved by the credit committee may be deposited in savings banks or trust companies incorporated under the laws of this commonwealth, or in national banks located therein, or may be invested in the bonds of any other credit union or any farmland bank incorporated under the laws of this commonwealth, or *in any securities* which are at the time of their *purchase* legal investments for savings banks in this commonwealth, . . .

. . . . . .

Section 17. . . . All applications for loans shall be made in writing and shall state the purpose for which the loan is desired and the *security offered.*

. . . . . .

Section 18. Loans upon the security of first mortgages upon farm lands shall in no case exceed in amount fifty per cent of the value of the property pledged as security, and shall be for the following purposes only: . . .

This statute presents the rather unusual situation of a corporation as to which there is no express authorization to hold either real or personal property. However, it seems to be the common law that a corporation has a right to take and hold real property reasonably necessary and convenient for the purposes authorized, except so far as expressly prohibited.

10 Cyc. 1122; 7 Am. & Eng. Encyc. of Law, 714; see also *Old Colony R.R. Corp.* v. *Evans*, 6 Gray, 25, 38.

The purposes of a credit union, as disclosed by this statute, necessarily require the possession of power to take and hold property, and there is a direct implication that this power includes real estate, found in the provisions of section 8 above quoted.

The primary purpose of these corporations is stated to be that of "accumulating and investing the savings of its members and making loans to members for provident purposes."

Whenever a corporation has power to loan money or enter into any other contract by which another becomes or may become indebted to it, and there are no express or implied charter or statutory restrictions, it always has, as an incident thereto, the same power as an individual to take any of the ordinary securities. And it may take a mortgage or deed of trust on real property, though not authorized to purchase or deal in land. (7 Am. & Eng. Encyc. of Law, p. 801; 10 Cyc. 1127.)

The present act contains an express implication of the power to take security, since it is provided in section 17 that all applications for loans shall state "the security offered."

Section 18 of the act prescribes in detail the limitations placed upon the security obtained by first mortgages upon farm lands, thereby recognizing the right in the corporation to take such mortgages.

A further indication pointing in the same direction is found in the provision of section 5 exempting such corporations from the provisions of R. L., c. 114, § 1, which section is a prohibition upon any persons or corporations, with certain exceptions therein stated, against transacting "the business of accumulating the savings of its members and loaning to them such accumulations in the manner of a co-operative bank."

A careful examination of the entire act discloses no express prohibition against taking a mortgage of real estate as security for a loan to a member of a credit union other than the limitations as to loans upon farm lands, found in section 18.

Accordingly, I am of the opinion that a credit union is authorized to take as security for a loan to a member a mortgage of real estate generally.

Your question is broad enough to include a query as to whether a loan could be made to a person other than a member and secured by mortgage of real estate.

I am of the opinion that such an investment is not authorized by the terms of this statute. It is true that section 11 authorizes surplus funds to be invested "in any securities which are at the time of their purchase legal investments for savings banks." It is, of course, common knowledge that first mortgages of a certain class are legal investments for savings banks. "Securities" is a word of broad meaning, and, in its widest interpretation, is almost synonymous with "investments." The definition applied to it by the Supreme Court of Massachusetts in the case of *Boston Railroad Holding Co.* v. *Commonwealth*, 215 Mass. 493, 497, is perhaps broad enough to include mortgages. The word, however, is frequently employed in a more limited sense as referring to investments of the kind ordinarily bought and sold in the market. In the present statute this word is restricted to this limited sense by the use of the word "purchase," as shown in the quotation above. It is only securities which are "at the time of their purchase" legal investments for savings banks which are here dealt with. A loan secured by a mortgage is not a purchase of a mortgage.

The present statute in several places indicates an intention that loans are to be made only to members. In section 5 it is provided that the credit union "may lend to its members at reasonable rates, or invest, as hereinafter provided, the funds so accumulated." Section 6 authorizes the making of by-laws prescribing "the fines, if any, which shall be charged for failure to meet obligations to the corporation punctually." Such a by-law, of course, would not be binding upon persons not members, and therefore an implication arises that loans are to be made only to members.

St. 1909, c. 419, which was the first act authorizing the incorporation of credit unions, and which, although repealed by the present act, is, in fundamental provisions, largely continued by it, contains the following: —

Section 15. The capital, deposits and surplus funds of the corporation shall be either lent to the members for such purposes and upon such security and terms as the credit committee shall approve, or deposited to the credit of the corporation in savings banks or trust companies incorporated under the laws of this commonwealth, or in national banks located therein.

In my opinion, it was not intended by the enactment of Gen. St., 1915, c. 268, to enlarge the class of persons to whom loans might be made.

Accordingly, I am of the opinion that such a corporation is not authorized to make loans to persons who are not members of it.

There is to be found in the act no restriction as to the ratio of a loan to the value of the security offered other than the limitation of section 18 with reference to mortgages upon farm lands, and I find no language seeming to imply such limitation.

Therefore, I am of the opinion that in making a loan secured by a mortgage upon real estate other than farm lands the sufficiency of the security offered is left entirely to the discretion of the credit committee, under the provisions of section 17 of the act, which is as follows: —

> The credit committee shall hold meetings, of which due notice shall be given to its members, for the purpose of considering applications for loans, and no loan shall be made unless all members of the committee who are present when the application is considered, and at least two thirds of all the members of the committee, approve the loan and are satisfied that it promises to benefit the borrower. All applications for loans shall be made in writing and shall state the purpose for which the loan is desired and the security offered.

Very truly yours,
HENRY C. ATTWILL, *Attorney-General.*

Insurance — Status of Alien Enemy — Situation of German Insurance Companies in Event of Declaration of War between this Country and Germany.

The Insurance Commissioner would be justified, under St. 1907, c. 576, § 7, in revoking the certificate of authority granted to a German insurance company, its officers and agents, in the event of a declaration of war between this country and Germany.

An alien enemy cannot enforce the payment of debts in the courts of this country during the continuance of the war, but his liabilities may be enforced against him, provided assets can be found here to meet such liabilities.

It *seems* that payments to an agent of a German insurance company resident in this country may legally be made by a policyholder in the absence of an act of Congress prohibiting such payment, and that such policyholder may properly receive payment of claims from such resident agents.

April 3, 1917.

Hon. Frank H. Hardison, *Insurance Commissioner.*

Dear Sir: — You have requested my opinion as to whether, in the event of war between this country and Germany, the German insurance companies now admitted under the law to transact business in this Commonwealth, through United States branches, so called, can continue to make new contracts of insurance herein, renew their present contracts, collect premiums, pay losses and carry out the terms of their policies now outstanding.

It is not possible to say that the law governing such a situation is definitely settled. In time of war the ultimate limit to the disabilities which may be placed upon citizens of the enemy country is a matter of power rather than of law. Conceivably, it would be possible for this country to confiscate the property of German companies situated in this country, and thereby render them incapable of carrying out either old or new contracts.

There would seem to be grave doubt as to the legality of any contract made or renewed by a company incorporated under the laws of a nation with which our own country might be at war.

One of the most complete discussions of this subject is found in the Massachusetts case of *Kershaw* v. *Kelsey*, 100 Mass. 561. In that opinion the following language is used by Mr. Justice Gray: —

> The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. . . .
>
> . . . When a creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the amount of the debt, throughout the war, payment there to such creditor or his agent can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor; it is not made to an enemy, in contemplation of international or municipal law; and

it is no objection that the agent may possibly remit the money to his principal in the enemy's country; if he should do so, the offence would be imputable to him, and not to the person paying him the money. (pp. 572–573.)

The decision in this case has not always met with complete approval. In *Robinson* v. *Premium Oil Pipe Line, Ltd.* (1915, 2 Chancery, p. 124), it is said: —

The learned Judge Gray, in the case of *Kershaw* v. *Kelsey*, which is reported in 100 Mass. page 561 (97 Am. Dec. 124, 1 Am. Rep. 142), states the law in our opinion correctly when he says, "The law of nations as judicially declared prohibits all intercourse between citizens of two belligerents which is inconsistent with the state of war between their countries," but we respectfully disagree with him when he holds that nothing comes within that principle except commercial intercourse.

As pointed out in the Massachusetts case, there may be found many declarations in other cases to the effect that practically all contracts between citizens of belligerent nations are prohibited. For example, in *Scholefield* v. *Eichelberger*, 7 Pet. 586, 593, it is said by Johnson, J.: —

The doctrine is not at this day to be questioned, that during a state of hostility the citizens of the hostile States are incapable of contracting with each other. For near twenty years this has been acknowledged as the settled doctrine of this court.

The purpose of acquiring insurance, of course, is to obtain a certainty of payment, in case of loss, as complete as possible. It is most undesirable for citizens of this State to be given policies as to which any reasonable excuse for avoidance can be imagined.

St. 1907, c. 576, § 7, provides that the Insurance Commissioner may revoke the certificate of authority granted to a foreign insurance company, its officers or agents, if he is of opinion that "its condition is such as to render its proceedings hazardous to the public or to its policyholders."

In view of the uncertainty as to payment of the policies issued by such a company, I am of opinion that you would be justified, in the event of a declaration of war, in revoking the authority of such companies.

As to payments made to such companies, it seems to be

established that it is illegal to make payments to citizens of a hostile nation where, in order so to do, the money is transmitted to that country. On the other hand, apart from some enactment by Congress, it appears by the quotation from the Massachusetts court, set forth above, that payment to an agent of such companies resident here would not be prohibited. 40 Cyc. 321-323.

The United States Supreme Court has held, contrary to the opinions of certain State courts, that the authority of an agent of a life insurance company resident in hostile territory is terminated by war, although by agreement of the company and the agent it might continue. *Insurance Co.* v. *Davis*, 95 U. S. 425. Whether or not the present contracts of agency of the German companies contain such provisions I am not informed, and of course I cannot predict whether or not, if the agents are willing to continue to represent those companies, their acts will be ratified.

It is stated that the law of Germany differs from that of England and the United States, and that under that law trade with the enemy is permitted to continue after the outbreak of war unless special prohibitive orders are issued. S. Oppenheim: Treatise on International Law (2d ed.), p. 136. If this is a correct statement of the German law, it might well be held that the authorization of agents of German companies continued after a declaration of war until terminated by corporate action or official order.

It is to be remembered, however, that during war the citizens of one of the enemy countries have no standing in the courts of the other, and can maintain no action to enforce payment of debts so long as hostilities continue. *Kershaw* v. *Kelsey*, *supra*.

On the other hand, liabilities of German companies may be enforced against them by the courts of this country, provided assets can be found here to meet such liabilities. See *Watts, Watts & Co.* v. *Unione Austriaca Di Navigazione*, 224 Fed. Rep., 188, 192. If the resident agents of such companies were willing to pay such claims without suit, I see no objection to an American citizen receiving the same.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Taxation — Exemption from — Farming Utensils — Utensils used in Connection with making Maple Sugar.

Utensils used by the owner or occupant of a farm in connection with the making of maple syrup or sugar are "farming utensils" within the meaning of St. 1909, c. 490, pt. I, § 5, cl. 11, providing for their exemption from taxation, only when the sap is gathered and made into maple sugar or syrup merely as an incidental part of the operation of such farm.

April 10, 1917.

Hon. William D. T. Trefry, *Tax Commissioner.*

Dear Sir: — I have your request for my opinion as to whether utensils used in connection with the making of maple sugar are "farming utensils" within the meaning of St. 1909, c. 490, pt. I, § 5, cl. 11, exempting from taxation "the wearing apparel and farming utensils of every person; his household furniture not exceeding one thousand dollars in value; and the necessary tools of a mechanic not exceeding three hundred dollars in value."

The foregoing provision is an exemption from a general tax, and therefore, in accordance with the usual rule, is to be construed strictly against the taxpayer. In my opinion, the word "farming," as used in this statute, includes merely the pursuit of agriculture, and, accordingly, refers to the tillage of the soil. It cannot be extended to include the gathering or harvesting of natural forest products. Thus, the gathering of sap from maple trees and its manufacture into syrup or sugar do not of themselves constitute farming within the meaning of this provision. It is, however, an incident of the operation of a farm for the owner or occupant to gather such products as are grown upon his farm and to market them. This has come to be an ordinary incident of the operation of a farm. Accordingly, in my opinion, when the sap of maple trees is gathered and made into syrup or sugar by the owner or occupant of a farm merely as an incidental part of the operation of his farm, the utensils used by him may be said to be "farming utensils" within the meaning of the above quoted provision, and thus exempt from taxation. Where such operations are not carried on as an incident of conducting a farm, in my opinion utensils thus used do not come within this exemption. In reaching this conclusion I in no way attempt

to review or reconsider the classification of farming utensils as set forth in the opinion of my predecessor, Hon. Dana Malone, III Op. Atty.-Gen. 66.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Labor Laws — Application to Employer performing Work under Contract with the Federal Government in Time of War.

An employer in this Commonwealth who is furnishing war supplies under contract with the Federal government is subject to the provisions of St. 1913, c. 758, except when the performance of such contract, independent of other work, requires the employment of labor in a manner contrary to the provisions of that chapter.

APRIL 16, 1917.

State Board of Labor and Industries.

GENTLEMEN: — I acknowledge your communication of the 13th inst., in which you request my opinion on the following question: —

Shall a contractor, furnishing war materials under contract or requirement of the United States government, be exempt from the requirements relating to the hours of labor of women and children contained in chapter 758 of the Acts of 1913, or shall the State Board of Labor and Industries, in each case called to its attention, determine what is "extraordinary emergency" or "extraordinary public requirement" under the law to which we have referred?

It is to be noted at the outset that your question does not involve a situation where the United States has required the employer to do the work. In such a situation I would unhesitatingly advise you that the laws of this Commonwealth would not apply. When a state of war exists no law of the Commonwealth can interfere or control the necessities or exigencies of the Federal government in prosecuting the war. Your question involves only voluntary contracts made with the United States for war supplies.

St. 1913, c. 758, provides, in part, that —

Every employer engaged in furnishing public service or in any other kind of business in respect to which the state board of labor and industries shall find that public necessity or convenience requires the employment of children under the age of eighteen or women by shifts during different periods or parts of the day, shall post in a conspicuous

place in every room in which such persons are employed a printed notice stating separately the hours of employment for each shift or tour of duty and the amount of time allowed for meals.

It further provides that —

In cases of extraordinary emergency as defined by section one of chapter four hundred and ninety-four of the acts of the year nineteen hundred and eleven or extraordinary public requirement, the provisions of this act shall not apply to employers engaged in public service or in other kinds of business in which shifts may be required as hereinbefore stated; but in such cases no employment in excess of the hours authorized under the provisions of this act shall be considered as legalized until a written report of the day and hour of its occurrence and its duration is sent to the state board of labor and industries.

Cases of extraordinary emergency, as defined by St. 1911, c. 494, § 1, as amended by Gen. St. 1916, c. 240, are the following: danger to property, life, public safety or public health.

I think it plain that employers engaged in furnishing war materials to the United States government, under contracts, are employers engaged in public service, within the meaning of the act. It follows that in cases of extraordinary emergency or extraordinary public requirement the provisions of St. 1913, c. 758, do not apply to such employers.

It is to be presumed that the United States government, at the time of making such contracts, has knowledge of the laws of the Commonwealth and the capacity of the employers' factories, and that it will not enter into contracts with employers in this Commonwealth requiring the operation of their factories contrary to the provisions of our laws unless an extraordinary emergency or public requirement necessitates it. It follows that if, in order to fulfill the contracts, it is necessary to operate the factories outside the provisions of said chapter 758, an extraordinary emergency or public requirement exists. This emergency or requirement exists, however, only when the necessity of so operating the factory is required to fulfill the government's contracts. In other words, it does not arise unless the work for the government, independent of other work, requires the operation of the factory in a manner contrary to the provisions of said chapter.

Accordingly, each case brought to your attention will depend upon its own facts, and in the first instance, applying the views above indicated, it is for your Board to determine

whether or not an extraordinary emergency or public requirement exists.

Instances may arise where the operation of the factory in a manner outside of the provisions of chapter 758 is requested by officials of the United States government, although the work of the factory is not devoted exclusively to the manufacture of war materials. In such instances I am of the opinion that your Board should assume that an extraordinary emergency or extraordinary public requirement exists.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Assessors of Town — Vacancy in Office of — How filled.

The office of assessor of taxes of a town is not one which can be filled under the provisions of St. 1913, c. 835, § 429.

APRIL 18, 1917.

Hon. WILLIAM D. T. TREFRY, *Tax Commissioner.*

DEAR SIR: — I acknowledge your communication of the 12th inst., requesting my opinion as to whether a vacancy in the office of assessor can be filled under the provisions of St. 1913, c. 835, § 429.

If at all, the vacancy could be filled only under the provisions of the second clause of the section, as the office of assessor is expressly excepted in the first clause. I am of the opinion that in view of the reference in the first clause of the section to the office of assessor as a town office, which but for the exception contained therein would be a town office, a vacancy in which would be filled by the selectmen by appointment, it was not the intention of the Legislature to include an assessor as a member of "a board" referred to in the second clause, and, therefore, the section has no application to a vacancy occurring in the office of assessor. I am fortified in this view by the fact that assessors are seldom referred to as a board in the Revised Laws and other statutes subsequent thereto.

It is also to be observed that where the statute provides that three assessors shall be elected, two assessors may act in the event of the death of one or in the event of the refusal of one to qualify. See *Cook* v. *Scituate,* 201 Mass. 107; *George* v. *School District in Mendon,* 6 Met. 497, 511.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Motor Vehicles — Registration of — Operator's License — Status of Automobiles owned by Federal or State Government and used for Military Purposes.

The laws of this Commonwealth do not require the registration of motor vehicles owned by the United States and used in the military service, or of motor vehicles owned by the Commonwealth or by its militia or home guard when such organizations are called out for active duty by the Commander-in-Chief, nor are the operators of such motor vehicles required to be licensed while operating them for military purposes.

April 24, 1917.

Massachusetts Highway Commission.

Gentlemen: — You have requested my opinion upon the question of whether automobiles owned by the Federal government, the militia of this Commonwealth or the home guard authorized by Gen. St. 1917, c. 148, must be registered before being operated on the highways, and the operators thereof licensed, in accordance with St. 1909, c. 534, and acts in amendment thereof.

Under date of May 8, 1908, in an opinion rendered to your commission by the Hon. Dana Malone, then Attorney-General, it was held that motor vehicles owned by the United States government were exempt from registration in this Commonwealth under the statutes relating to the use and operation of motor vehicles, on the ground that a State cannot tax or subject to conditions instrumentalities of the Federal government used in carrying out its constitutional functions. *A fortiori* it must be held that in time of war motor vehicles owned by the United States are exempt from registration under our statutes while being used in military service, and the operators of such automobiles, while on active duty, are not required to be licensed.

Somewhat different considerations apply as regards automobiles owned by the Commonwealth or its military forces. In this case there is no constitutional objection to requiring such vehicles to be registered and the operators thereof licensed under our statutes. The question is one of interpretation, to determine whether or not it was the intention of the Legislature to include automobiles of this class. It is a well-settled rule of statutory construction that a general statute does not apply to the sovereign in the absence of language in the act showing a contrary intention. In this connection see *Teasdale* v. *Newell, etc., Construction Co.*, 192 Mass. 440.

Accordingly, I am of the opinion that automobiles owned by the Commonwealth, the militia or the home guard provided for by Gen. St. 1917, c. 148, when called out for active duty by the Governor as Commander-in-Chief, are not required to be registered before being operated upon the highway, nor the operators thereof to be licensed while such vehicles are being used for military purposes.

I suggest the advisability of your Commission communicating with the Governor and the United States military authorities, to the end that some distinguishing sign may be placed on such cars while in active service, so as to obviate the confusion and difficulties which would otherwise arise.

Yours truly,

HENRY C. ATTWILL, *Attorney-General.*

Fire Prevention Commissioner — Control over Cities and Towns in Metropolitan District.

The Fire Prevention Commissioner is empowered by St. 1914, c. 795, to make regulations governing the storage, use or other disposition of dynamite or other explosives by cities and towns within the metropolitan district.

MAY 2, 1917.

JOHN A. O'KEEFE, Esq., *Fire Prevention Commissioner.*

DEAR SIR: — You have requested my opinion as to whether St. 1914, c. 795, gives you control of the keeping, storage, use, handling and other disposition of dynamite and other explosives by cities and towns within the metropolitan fire prevention district.

Under section 3 of that chapter all existing powers, in whatever officers vested, other than courts, "to license persons or premises, or to grant permits for or to inspect or regulate or restrain the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of gunpowder, dynamite . . . or any explosive or inflammable fluids or compounds, . . . are hereby transferred to and vested in the commissioner."

St. 1904, c. 370, § 2, as amended by St. 1905, c. 280, § 1, provides as follows: —

The detective and fire inspection department of the district police may make regulations, except as hereinbefore provided, for the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of gunpowder, dynamite, crude petroleum or any of its prod-

ucts, or explosive or inflammable fluids or compounds, tablets, torpedoes or any explosives of a like nature, or any other explosives, except fireworks and fire crackers, and may prescribe the materials and construction of buildings to be used for any of the said purposes.

There is no intimation in these statutes of any exception in favor of cities and towns, and, accordingly, I am of the opinion that your powers in this respect extend to cities and towns as well as to individuals.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Sale of Real Estate for Payment of Taxes — Requisites of — Where assessed to Heirs of Deceased Person.

It *seems* that a tax collector, in advertising for sale for payment of taxes real estate assessed to the heirs of a deceased person, under St. 1909, c. 490, pt. II, § 39, should insert in the notice of the time and place of the sale the names of all heirs or devisees shown by the records of the Probate Court.

MAY 3, 1917.

Hon. WILLIAM D. T. TREFRY, *Tax Commissioner.*

DEAR SIR: — I acknowledge your request for my opinion as to whether, under St. 1909, c. 490, pt. II, § 39, a tax collector, in advertising for sale real estate assessed to the heirs of a deceased person, is required to give the names of those heirs as disclosed by the records of the Probate Court. The section in question is as follows: —

The collector shall give notice of the time and place of sale of land for payment of taxes by publication thereof. Such notice so published shall contain a substantially accurate description of the several rights, lots, or divisions of the land to be sold, the amount of the tax assessed on each, and the names of all owners known to the collector.

In the case of *Conners* v. *Lowell*, 209 Mass. 111, 118, the Supreme Judicial Court, in discussing the validity of a number of tax sales made by the collector of the city of Lowell, dealt with a somewhat similar question in the following manner: —

Certain lands were properly assessed to the "Heirs of George T. Woodward" and to the "Heirs of Irene E. Richardson," under R. L. c. 12, § 21 (now St. 1909, c. 490, pt. I, § 21). In these instances the

records of the Probate Court for the county in which Lowell is located showed on the 1st of May of the year in which the taxes were assessed who the heirs of Woodward and Richardson severally were and that one or more of the heirs of each resided in Lowell. The recitals in the deeds of this class were that demand was made upon "the heirs" of deceased. The collector was required to serve a demand for the payment of the tax upon every resident assessed, or, in case of heirs of a deceased person, upon one of them, and to state in his deed "the name of the person on whom the demand . . . was made." R. L. c. 13, §§ 14, 43 (now St. 1909, c. 490, pt. II, §§ 14, 44). To say that a demand has been made upon the heirs of an intestate is not giving the name of the person upon whom the demand was made. The two sections cited impose upon the collector the duty of finding a resident heir, if there is one, making the demand upon him, and then naming him in the deed. To name a person is not the same as to describe him. The name of a person is the distinctive characterization in words by which he is known and distinguished from others. Such a designating appellation was not given by the words "heirs of" a person. Tax deeds lacking it are invalid. *Reed* v. *Crapo*, 127 Mass. 39. Assessors are charged with notice of what may be found upon the probate records in determining whether to make an assessment to the heirs or devisees of one deceased. *Tobin* v. *Gillespie*, 152 Mass. 219. There is no hardship in holding the tax collector to the same investigation, if necessary, in ascertaining the name of an heir.

If assessors are charged with notice of what may be found upon the probate records in determining whether an assessment is to be made to the heirs or devisees of a deceased person, and a tax collector is charged with the same notice in determining the name of an heir for the purpose of making a demand, it seems to me probable that the court would hold that a tax collector is also charged with notice of what may be found upon the probate records in determining the names of all owners known to him, for the purpose of complying with section 39. In any event, in view of the necessity for a strict compliance by a tax collector with all the requirements of law in order that a tax sale may be valid, I must advise you that the safe course for the collector to take is to insert in the notice of the time and place of the sale the names of all heirs or devisees shown by the records of the Probate Court.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Trust Companies — Reserve — Status of Government Bonds.

A trust company holding, as part of its reserve, bonds of the United States or of this Commonwealth complies with the provisions of St. 1908, c. 520, § 9, if the amount of money held by it is at all times equal to at least 5 per cent. of the amount of all its time and demand deposits, and provided the amount of such bonds is sufficient to bring the total cash and bonds up to two-fifths of the total reserve required.

May 4, 1917.

Hon. Augustus L. Thorndike, *Bank Commissioner.*

Dear Sir: — You have requested my opinion as to whether, under the provisions of St. 1908, c. 520, § 9, a trust company, part of whose reserve is made up of United States bonds, is required to have cash equal to two-fifths of the required reserve, or only 5 per cent. of the aggregate amount of all its time and demand deposits.

The section referred to is as follows: —

Not less than two fifths of such reserve shall consist either of lawful money of the United States, gold certificates, silver certificates or notes and bills issued by any lawfully organized national banking association, and the remainder of such reserve may consist of balances, payable on demand, due from any trust company in the city of Boston authorized to act as reserve agent as hereinafter provided, or from any national banking association doing business either in this commonwealth or in the cities of New York, Philadelphia, Chicago, or Albany; but a portion of such reserve not exceeding one fifth may consist of bonds of the United States or of this commonwealth computed at their fair market value, which are the absolute property and in the possession of such corporation: *provided*, that the aggregate amount of lawful money of the United States, gold certificates, silver certificates and notes and bills issued by any lawfully organized national banking association held by such corporation shall at all times be equal to at least five per cent of the aggregate amount of all its time and demand deposits, exclusive of deposits in its savings department.

While the statute is by no means clear in its provisions in this regard, it appears that the section authorizes a portion of "such reserve," meaning thereby the total reserve provided in section 8, to consist of bonds of the United States or of this Commonwealth, with the proviso immediately following that the aggregate amount of lawful money held by the company shall be equal to 5 per cent. of the aggregate deposits, exclusive of deposits in its savings department.

It is to be observed that the deposits to be considered in determining this 5 per cent. will in general be a larger amount than those upon which the total reserve of 15 per cent. is normally based, since that reserve is determined by excluding the amount of time deposits represented by certificates or agreements in writing upon which thirty days are still to run.

In view of the ready marketability and generally stable value of the bonds specified, it would seem that the Legislature might well have considered that such bonds to a limited extent could safely be substituted for cash. Although, in view of the difference in the class of deposits upon which the two-fifths of the reserve dealt with in the first part of the section and the 5 per cent. mentioned in the latter part are to be figured, it is conceivable that the 5 per cent. might in some cases exceed the two-fifths, such a condition would be most unlikely. Accordingly, it is difficult to see what purpose could have been intended by the Legislature in providing for the 5 per cent. mentioned except to fix absolutely the amount of cash required as a minimum in cases where the company holds government bonds as a part of its reserve.

I am of the opinion, therefore, that a trust company holding, as a part of its reserve, bonds of the United States or of this Commonwealth complies with the provisions of this section if the aggregate amount of lawful money is at all times equal to at least 5 per cent. of the aggregate amount of all its time and demand deposits, provided the amount of such bonds is sufficient to bring the total cash and bonds up to two-fifths of the total reserve required.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Constitutional Law — Effect of Unconstitutionality of Part of Statute upon Remaining Parts.

A statute which exempts agreements between farmers or agriculturalists relative to the sale of their crops from the operation of a general act, prohibiting combinations in restraint of trade, is unconstitutional.

If such exemption was contained in a statute independent of the general act, its unconstitutionality would not affect the validity of the general act.

May 7, 1917.

Warren E. Tarbell, Esq., *House Chairman, Joint Committee on Conference.*

Dear Sir: — I am in receipt of a communication from the Joint Committee on Conference requesting my opinion upon the following questions: —

1. Whether the committee may recommend a division of House Bill No. 1805, entitled "An Act to prohibit the control of prices of commodities in common use," into two bills, the first to contain all the provisions of the present bill, and the second to contain an exemption of agreements between farmers or other persons engaged in agricultural or horticultural pursuits relative to the sale of the products of their own farms.
2. Whether, if this be done and both enactments passed as separate bills, they would be constitutional.

Your first request presents a question of parliamentary law which is to be determined by the rules and precedents of the General Court, and is one upon which I feel I should express no opinion.

In answer to your second inquiry, I beg to advise you that, in my opinion, the bill which exempts from the operation of the general act, prohibiting certain combinations in restraint of trade and monopolies, agreements between farmers or other persons engaged in agricultural or like pursuits relative to the sale of products of their own lands, under the decision of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, would be unconstitutional, as in violation of the Fourteenth Amendment to the Constitution of the United States.

The precise question presented by your order is as to what effect the unconstitutionality of this exemption would have upon the validity of the main bill. It was held in the Connolly case, above cited, that where this exemption constituted a part of the principal bill the entire bill was invalid. This is on the ground that the court could not say that the Legislature would have passed the bill if the exemption had not been included. The rule is stated in *Commonwealth* v. *Petranich*, 183 Mass. 217, 220, that "it is an established principle that where a statutory provision is unconstitutional, if it is in its nature separable from the other parts of the statute, so that they may well stand independently of it, and if there is no

such connection between the valid and the invalid parts that the Legislature would not be expected to enact the valid part without the other, the statute will be held good, except in that part which is in conflict with the Constitution."

Where an exemption from the operation of a general statute is enacted subsequently to and independently of the main statute, the two bills would quite clearly seem to be separable, and the intention of the Legislature to have the main bill take effect, even though the exemption were invalid, would be sufficiently indicated. See *ex parte Pfirrman*, 134 Cal. 143, where it was held that an unconstitutional special act amending a general act which was passed earlier on the same day did not affect the validity of the otherwise valid general act.

Accordingly, I am of the opinion that if the exemption referred to is incorporated into a separate bill and passed subsequently to the enactment of the main provisions of House Bill No. 1805, the unconstitutionality of the exemption would not affect the validity of the principal bill.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Constitutional Law — Equal Protection of the Laws — Due Process of Law — Licensing of Milk Contractors.

A bill prohibiting the buying of milk or cream within the Commonwealth from producers, for the purpose of shipping it to any other city or town for sale or manufacture, unless such business is transacted regularly at an office or station within the State, and unless the vendee is licensed by the State Board of Agriculture and furnishes security conditioned upon the prompt payment by him for milk or cream purchased, would be unconstitutional if enacted into law, as it would violate the Fourteenth Amendment to the Constitution of the United States.

MAY 7, 1917.

Hon. CHANNING COX, *Speaker of the House of Representatives.*

SIR: — I acknowledge the receipt of an order of the House of Representatives requesting my opinion upon the constitutionality of House Bill No. 14, entitled "An act to require the licensing of milk contractors by the State Board of Agriculture and to regulate payment by them to milk producers."

The bill in substance provides that no milk or cream shall be bought in the State from producers, for the purpose of

shipping the same to any other city or town for sale or manufacture, unless such business be transacted regularly at an office or station within the State, and unless the vendee is licensed by the secretary of the State Board of Agriculture. The bill further provides that before issuing a license the secretary may require the applicant to furnish security, by bond or otherwise, conditioned upon the prompt payment by him for the milk or cream purchased, provided that the secretary may exempt from the requirement of furnishing a bond an applicant who satisfies the secretary of his financial responsibility, reliability and good intent, or who makes a sworn statement that he intends to pay his patrons at regular intervals of not more than two weeks for milk or cream furnished to him. All licenses are made subject to revocation by the secretary of the State Board of Agriculture for failure on the part of the licensee to pay his bills for milk and cream, in which case no new license may be issued to him until he shall satisfy the secretary of his good intent and ability to pay in the future, and all payments due the producers for milk or cream prior to the cancelling of the license are made in full.

The obvious purpose of the proposed act is to insure regular payments to producers for milk and cream purchased from them for the purpose of resale or manufacture.

It is unnecessary, for the purposes of your question, to determine whether legislation of the general character contemplated by the bill could constitutionally be enacted if restricted in its operation to vital necessaries, for the reason that, assuming this could be done, there are objections to the bill which, in my opinion, are fatal to its constitutionality. If a bill of this character can constitutionally be enacted, it must be upon the ground that it tends to promote the public health or welfare by insuring an adequate production and supply of such a vital necessity. All legislation to promote the public health or welfare must be reasonable and fairly adapted to effect that result.

Ordinarily, a bill which limits the right of a person to engage in a lawful business must be uniform, and apply equally to all persons engaging in such business. Such legislation is subject to the provisions of the Fourteenth Amendment to the Constitution of the United States, which prohibits a State from denying to any person within its jurisdiction the equal protection of the laws. No arbitrary distinctions or discriminations can be made by the Legislature in enacting such

laws, at least between persons within the general scope of the act. All classifications must be based upon some sound reason. As was said by the court in *Commonwealth* v. *Hana*, 195 Mass. 262, 266, in discussing the constitutionality of an act requiring hawkers and pedlers to be licensed, but exempting residents of a city or town who paid taxes there on their stock in trade and who were qualified to vote there: —

> Even before the adoption of the Fourteenth Amendment it was a settled principle of constitutional law that statutes in regard to the transaction of business must operate equally upon all citizens who desire to engage in the business, and that there shall be no arbitrary discrimination between different classes of citizens. Under the Fourteenth Amendment, all persons are entitled to the equal protection of the laws. . . . These cases and others show that a discrimination, founded on the residence of the applicant for a license or the amount of tax paid by him, cannot be sustained under the Constitution.

This bill applies only to persons, firms, associations or corporations that buy milk or cream within the State from producers, for the purpose of shipping the same to any other city or town for sale or manufacture. It does not apply to persons who buy milk or cream for the purpose of selling or manufacturing it in the same city or town. Neither does it apply to a person who buys milk or cream for such purpose in a city or town other than that in which he sells or manufactures it, unless the milk or cream be "shipped" to the latter place. The ordinary meaning of the word "ship" is to deliver to a common carrier for transportation. Thus, a person in these circumstances who transports the milk or cream himself or by an agent other than a common carrier, to another city or town for the purpose of sale or manufacture, would be exempt from the requirements of this bill, while another person in the same situation who delivers his milk for transportation to a common carrier is required to obtain a license and to furnish security by bond or otherwise. I am unable to discern any sound ground for this distinction, since there appears to be no reason why a person who ships milk or cream, for the purpose of sale or manufacture, into a town other than that in which it was purchased is not as likely to pay his milk bills to the producers as a person who buys from producers in the same town in which he sells or manufactures it, or a person who himself transports milk or cream into the town or city in which it is sold or manufactured.

The bill would permit a person whose place of business is in Boston to purchase milk of producers in the various cities and towns and to resell it in the same community to persons who ship the milk to other cities or towns for the purpose of sale or manufacture there, without either of these persons being subject to the provisions of this act.

Indeed, it is somewhat difficult to see any sound reason why the general public is not as much interested in securing to the producers payment for milk and cream bought from them by a person, firm, association or corporation, when it is bought for its own consumption or other use, as well as when bought for the purpose of sale or manufacture.

Furthermore, the bill applies not only to milk but also to cream, excluding all other products of milk. If a distinction can be made at all in regard to necessaries of life, in a bill which is not designed for purposes of inspection or insuring the wholesome condition of their handling or transportation, but solely intended for insuring an adequate supply by securing payment to the producers, it necessarily must be because there is a greater necessity for the supply of the one than of the others. Cream, so far as I am aware, is a no greater necessity of life than other products of milk, such as butter or cheese. Under the operation of this bill a person buying cream from a producer is compelled to be licensed, furnish a bond and regularly to maintain an office or station in the place in which he purchases the cream, while another, buying butter or cheese under the same circumstances, is under no such obligation. I am unable to see any sound ground for this distinction.

It is to be observed, as bearing upon the reasonableness of this provision, that one farmer engaged in the production of cream is given certain security by law, while his neighbor engaged in selling other products of milk is not given this security.

The bill makes no distinction between persons buying milk and cream for cash and those buying milk or cream on credit. It is manifestly unreasonable to require persons purchasing products paid for in cash at the time of the purchase to furnish security for such payment.

The bill is, in my opinion, further objectionable in that it requires not only the securing of a license and the furnishing of a bond by a person, firm, association or corporation that buys milk or cream for the purposes named in the bill,

but in addition requires that such business be transacted regularly at an office or station within the State. If this latter requirement stood alone it would be doubtful whether it should be construed as requiring a person buying milk or cream to maintain an office or station at which the business of buying such milk or cream should be transacted regularly at every place where the milk or cream was purchased, or whether it required a person engaging in such business to maintain only one office or station within the State where this business is transacted regularly.

Section 1 of the bill, however, contains this further provision in regard to the issuance of a license: —

> The secretary shall thereupon issue to such applicant, on payment of five dollars, a license entitling the applicant to conduct the business of buying milk and cream from producers for the purpose aforesaid at an office or station at the place named in the application.

This plainly indicates that the former construction must be adopted; that is, that all persons buying milk or cream within the State for the purposes mentioned in the bill must maintain an office or station, and regularly transact business at every place where milk or cream is so purchased.

This additional requirement is, in my opinion, unreasonable and burdensome. It would prevent, in times of emergency or drought, persons who ordinarily buy their milk at certain places in the State from buying milk at any other places, unless the business of buying milk at such other places be regularly transacted. It would operate to restrain trade by tending to eliminate free competition and to divide the milk-producing territory, and cannot, in my opinion, reasonably be justified as a proper exercise by the Legislature of its police power in the interests of the general welfare.

Again, section 3 of the bill provides that —

> The secretary of the state board of agriculture may exempt from the furnishing of a bond, any person, firm, corporation, partnership or association applying for license as a milk contractor, who satisfies said secretary of his financial responsibility, reliability and good intent.

I doubt very much whether any law applicable to a particular business, which exempts from its operation all those who satisfy an administrative officer of their financial responsibility,

reliability and good intent, can be sustained on the theory that those who satisfy such officer of these facts are as likely to pay their bills and to comply with the law without furnishing security as those who actually do furnish security, particularly when the statute leaves the determination of such exemption to the practically uncontrolled discretion of the administrative officer. As is well stated in Cooley's Constitutional Limitations, at page 559: —

> Those who make the laws "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough."

There are other objections which might be urged against the bill, dependent upon the construction finally given to its terms, which I deem it unnecessary to discuss.

For the foregoing reasons I am constrained to advise that, in my opinion, House Bill No. 14 would be unconstitutional if enacted into law.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Hawker and Pedler — Itinerant Vendor — Sales of Goods by Sample for Future Delivery.

A person who conducts a transient business in a building or structure, making only *bona fide* sales by sample for future delivery, is not required to obtain a license either as an itinerant vendor under R. L., c. 65, §§ 1–12, as amended, or as a hawker and pedler under R. L., c. 65, § 13, as amended by Gen. St. 1916, c. 242.

MAY 10, 1917.

THURE HANSON, Esq., *Commissioner of Weights and Measures.*

DEAR SIR: — I acknowledge your request for my opinion as to whether a person who is conducting a transient business in a building or structure, making only *bona fide* sales by sample for future delivery, is required to obtain a license either as an itinerant vendor under R. L., c. 65, §§ 1 to 12, inclusive, as amended, or as a hawker and pedler under section 13 of that chapter, as amended by Gen. St. 1916, c. 242.

Such a person plainly seems to come within the definition of an itinerant vendor set forth in R. L., c. 65, § 1. By

section 2, however, it is expressly provided that the first twelve sections of this chapter, regulating itinerant vendors, shall not apply to "bona fide sales of goods, wares or merchandise by sample for future delivery." This provision makes it plain that a person conducting a business such as you describe is not required to obtain a license as an itinerant vendor.

R. L., c. 65, § 13, as amended by Gen. St. 1916, c. 242, defines a hawker and pedler as follows: —

> Whoever, except itinerant vendors, wholesalers or jobbers having a permanent place of business in this commonwealth and selling to dealers only, and commercial agents or other persons selling at wholesale by sample, lists, catalogues or otherwise for future delivery, goes from town to town or from place to place in the same town carrying for sale or barter, or exposing for sale or barter, goods, wares or merchandise, shall be deemed a hawker or pedler within the meaning of this chapter.

In my opinion, the phrase "except itinerant vendors" refers to itinerant vendors as defined by section 1, and not merely to such itinerant vendors as are regulated and required to be licensed by the first twelve sections of the chapter. It follows that no persons coming within the definition of itinerant vendors set forth in section 1 can come within the definition of hawkers and pedlers set forth in section 13, as amended.

Furthermore, a hawker and pedler is defined as a person who "goes from town to town or from place to place in the same town carrying for sale or barter, or exposing for sale or barter, goods, wares or merchandise." A person who is conducting a transient business in a building or structure cannot be said to go from town to town or from place to place in the same town, within the meaning of this definition, nor, in my opinion, does a person who carries only samples, and who sells only for future delivery by use of such samples, carry for sale or expose for sale goods, wares and merchandise. Accordingly, a person engaged in a business such as you describe is not a hawker and pedler, and is not required to obtain a license as such.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Tidewaters — Compensation for Displacement of.

The proprietors of the land bounding on the southerly side of the Mystic River between Johnson's Wharf, so called, and the Chelsea bridge cannot now fill the flats adjoining their property except subject to the provisions of R. L., c. 96, § 23, providing for compensation for tidewater displaced. *Bradford* v. *Metcalf*, 185 Mass. 205, *distinguished*.

May 10, 1917.

Commission on Waterways and Public Lands.

Gentlemen: — You request my opinion upon the question of whether your Commission is authorized to make a charge for tidewater displacement, under the provisions of R. L., c. 96, § 23, to present owners of property within the area bounding on the southerly side of the Mystic River between Johnson's Wharf, so called, and the Chelsea bridge.

By St. 1852, c. 105, the proprietors of land and flats within this area were incorporated under the name of the Mystic River Corporation, and the right was granted to this corporation to fill certain flats within the boundaries specified in said act, provided that the work should be commenced within three years and completed within eight years from the passage of the act. This statute was repealed by St. 1855, c. 481, except so far as it related to the incorporation of the Mystic River Corporation. By the later statute substantially the same rights were conferred upon the corporation, some change being made in the boundaries within which the filling could be made, and the time for the completion of the work extended to ten years from the passage of the act. It appears that the Mystic River Corporation attempted to divide the benefits among its individual members, to be held by them in severalty in proportion to their respective ownership of the shore. This attempt, together with adverse possession for a long period of time on the part of the individual owners, as against the corporation, was decided by our Supreme Judicial Court in the case of *Bradford* v. *Metcalf*, 185 Mass. 205, to have conferred upon the individual proprietors the rights which were granted to the corporation by the acts above referred to.

The time allowed to the corporation for the doing of the work was extended by various statutes, the last of which appears to be St. 1893, c. 334. That statute provided that —

The time heretofore allowed for the completion of the improvements by the proprietors of the lands, wharves and flats lying between John-

son's wharf and Elm street on Mystic river, authorized by the special laws of this Commonwealth, is, with the rights and subject to the requirements of such laws, extended ten years from the passage hereof.

In 1902 the precise question which you have presented arose in the case of *Bradford* v. *Metcalf*, *supra* (decided 1904), in which it was determined that the Commonwealth was not entitled to receive compensation for displacement of tidewater caused by filling in this area. It is to be noted that the displacement involved in this case was caused by work which was done before the expiration of the time allowed for the completion of the improvements, as extended by St. 1893, c. 334.

No statute subsequent to 1893, further extending the time for the completion of this work, can be found, and, accordingly, I am of the opinion that the case of *Bradford* v. *Metcalf*, *supra*, is not applicable to the present situation, since the grant has by its own terms expired. Before any work can now be done in this area a license must be procured from your Commission, which will be subject to all the requirements of the general law, including payment for displacement of tidewater. The answer to your question, therefore, must be in the affirmative.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Attorney-General — Powers of — District Attorneys.

The Attorney-General has as much power in investigating alleged criminal acts as any other official, but has no power to enforce the attendance of witnesses or the giving of testimony, that power being restricted solely to the grand jury.

The Attorney-General has power equal to that of a district attorney in presenting evidence to the grand jury.

Under R. L., c. 7, § 17, the Attorney-General, when present, has control of all cases, both civil and criminal, enumerated in that section.

MAY 15, 1917.

Hon. CHANNING H. COX, *Speaker of the House of Representatives.*

SIR: — I acknowledge the receipt of an order of the House of Representatives in the following form: —

Ordered, That the House of Representatives hereby requests the opinion of the Attorney-General upon the following question of law: Has the Attorney-General full power under existing statutes to in-

vestigate and to prosecute criminally any individual, firm or corporation that may have been guilty of fraud in the building or financing of the Hampden Railroad Corporation or in connection with the securities thereof?

I assume that the fraud therein referred to means such fraud as would constitute a criminal offence at the common law or under the statutes of the Commonwealth.

Your inquiry raises two questions: first, as to the power of the Attorney-General, under the existing statutes, to investigate any alleged criminal act; and second, as to his power to prosecute individuals, firms or corporations that may have been guilty thereof.

As to the power of the Attorney-General to investigate: It is not entirely clear what is meant by "full" power. If the meaning of this question is to inquire whether the Attorney-General has power to investigate equal to that of any other official, the question is to be answered in the affirmative. If, on the other hand, the purpose of the inquiry is to ascertain whether greater power could be given to the Attorney-General to investigate than is now furnished under existing statutes, I answer your question in the negative. The Attorney-General may investigate an alleged criminal fraud to the extent to which the persons within whose knowledge the facts lie are willing to disclose them, but he has no power, in aid of such investigation, to summon, or enforce the attendance of, witnesses or to require any one to furnish information unless such person desires to do so. This power, in the type of case to which your question refers, is restricted solely to a grand jury.

It is to be observed that under the Constitution of this Commonwealth the prosecution of crimes punishable by imprisonment in a State prison can be only after indictment by a grand jury. *Jones* v. *Robbins*, 8 Gray, 329. The position of the district attorney or any other prosecuting officer before the grand jury is but that of an assistant to that body, and his right to remain and assist the grand jury is subject to their control. I think it plain that the power of the Attorney-General in assisting the grand jury is equal to that of a district attorney, and that he may assist and present evidence to that body with its consent.

The second part of your question is more difficult to answer.

The powers of the Attorney-General are not defined by the provisions of the Constitution. He is the general law officer of

the Commonwealth, and usually it has been assumed that, where there is no provision of statute to the contrary, he may represent the Commonwealth in all proceedings of every nature in which the Commonwealth is a party or interested. From time to time, however, statutes have been passed giving powers to the district attorneys, and your question involves a consideration of whether such statutes, by providing that the district attorney shall represent the Commonwealth in certain instances, abridge the power of the Attorney-General by placing the district attorney in exclusive control in such instances.

R. L., c. 7, § 1, provides that the Attorney-General shall appear for the Commonwealth and its officers, boards and commissions "in all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said officers are called in question, in all the courts of the commonwealth, except upon criminal recognizances and bail bonds." It also provides that "all legal services required by such officers, boards, commissions and commissioner of pilots for the harbor of Boston in matters relating to their official duties shall be rendered by the attorney general or under his direction." This statute undoubtedly gives to the Attorney-General the general control of all civil suits in which the Commonwealth is a party or interested, other than suits upon criminal recognizances and bail bonds.

Section 4 of the same chapter provides that the Attorney-General "shall consult with and advise the district attorneys in matters relating to their duties; and, if in his judgment the public interest so requires, he shall assist them by attending the grand jury in the examination of a case in which the accused is charged with a capital crime, and appear for the commonwealth in the trial of indictments for capital crimes."

Section 17 of said chapter 7 provides: —

> The district attorneys within their respective districts shall appear for the commonwealth in the superior court in all cases, criminal or civil, in which the commonwealth is a party or interested, and in the hearing, in the supreme judicial court, of all questions of law arising in the cases of which they respectively have charge, shall aid the attorney general in the duties required of him, and perform such of his duties as are not required of him personally; but the attorney general, when present, shall have the control of such cases.

Statutes are to be construed, when possible, so as not to be in conflict with each other, and I am therefore of opinion that

the clause in section 17, "but the attorney general, when present, shall have the control of such cases," refers not alone to the cases in which the district attorney is aiding the Attorney-General in the duties required of him, but refers to all cases, both civil and criminal. By adopting such a construction the provisions of sections 1, 4 and 17 of chapter 7 are not inconsistent. Under section 1 general authority over all civil cases, other than suits on recognizances and bail bonds, is expressly given to the Attorney-General. Under section 4 he is directed to appear in all capital cases if in his judgment the public interest so requires; and by section 17 the district attorney is required to appear in criminal cases and in civil cases unless relieved from this obligation by reason of the Attorney-General's appearing in such cases, and at all times, within their respective districts, the district attorneys are required to render such aid to the Attorney-General as he may require.

I am fortified in this view by the history of section 17. St. 1832, c. 130, § 9, provided for the division of the Commonwealth into criminal districts, and for the appointment of a district attorney for each district. It provided that the district attorneys, within their respective districts, should appear and act for the Commonwealth in all cases, criminal or civil, in which the Commonwealth should be a party to the record or be interested, in the courts of common pleas and in the Supreme Judicial Court; and that they should also, within their respective districts, perform all the duties which the Attorney-General and the solicitor general, or either of them, before the passage of the act were by law obliged to perform, provided "that the attorney general, when present, shall in any court have the direction and control of any prosecutions and suits in behalf of the commonwealth." This provision was carried into the Revised Statutes, appearing in section 38 of chapter 13, as follows: "Provided, that the attorney general, when present, shall have the direction and management of all prosecutions and suits in behalf of the commonwealth." The clause as it now reads in the Revised Laws appears for the first time in section 31 of chapter 14 of the General Statutes. Section 9 of chapter 181 of the General Statutes provides that "the provisions of the General Statutes so far as they are the same as those of existing laws, shall be construed as a continuation of such laws, and not as new enactments." This same provision is contained in the Public Statutes and the Revised Laws.

Accordingly, I am of the opinion that "such cases," referred to in the latter part of section 17 of chapter 7 of the Revised Laws, refers to all cases, criminal or civil, in which the Commonwealth is a party, enumerated in said section.

Assuming, then, that by the use of the term "full power" to investigate is meant power equal to that of any other official, I answer the inquiry of the House of Representatives in the affirmative.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Statutes — Repeal by Implication — Board of Health.

The repeal of R. L., c. 75, § 57, by the enactment of St. 1902, c. 213, did not repeal by implication R. L., c. 75, § 53, relating to the effect of the neglect of local boards of health to give notice to the State Board of Health, now the State Department of Health, of diseases dangerous to the public health, in their respective cities and towns.

MAY 17, 1917.

State Board of Charity.

GENTLEMEN: — You have requested my opinion as to whether R. L., c. 75, § 53, is law at the present time, in view of the repeal of R. L., c. 75, § 57, by the enactment of St. 1902, c. 213.

R. L., c. 75, § 52, requires local boards of health having notice of a disease dangerous to the public health, in their respective cities or towns, to give notice thereof to the State Board of Health, now the State Department of Health.

Section 53 provides: —

> If such board refuses or neglects to give such notice, the city or town shall forfeit its claim upon the commonwealth for the payment of expenses as provided in section fifty-seven.

Section 57 provides that reasonable expenses incurred by local boards of health, in making the provision required by law for a person infected with such a disease, "shall be paid by such person, his parents or master, if able; otherwise by the town in which he has a legal settlement. If he has no settlement, they shall be paid by the commonwealth and the bills therefor shall be approved by the state board of charity."

St. 1902, c. 213, § 1, although it contains several new requirements with reference to notice and determination of settlement, nevertheless leaves the law substantially the same as before with reference to the parties made liable for expenses incurred, the only change in this respect being the elimination of the words "or master." The person himself, his parents, the city or town of settlement or the Commonwealth, in case of no settlement, remains liable as before.

Section 3 of this statute expressly repeals R. L., c. 75, § 57.

Despite the fact of this express repeal, I am of the opinion that, so far as liability is fixed upon the parties mentioned above, the statute is to be construed as a continuation of the previous law rather than as a repeal and re-enactment.

This provision as to liability of the city or town of settlement and the Commonwealth has been a part of our statute law for over one hundred years. (See St. 1797, c. 16, § 1.)

Where a new act takes effect simultaneously with the repeal of the old one, the new one may more properly be said to be substituted in place of the old one, and to continue in force, with modifications, the provisions of the old, instead of abrogating or annulling them and re-enacting the same as a new and original act. *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1, 12; *Steamship Co.* v. *Joliffe*, 2 Wall. 450, 459. This principle has been applied by the Supreme Judicial Court of Massachusetts in cases dealing with the effect of express repeal in general revisions or codifications of the statutes. *Wright* v. *Oakley*, 5 Met. 400, 406; *United Hebrew Benevolent Assn.* v. *Benshimol*, 130 Mass. 325.

The provisions of R. L., c. 75, §§ 52 and 53, were originally enacted in 1883 (St. 1883, c. 138), at a much later time than the statute as to payment of expenses incurred in caring for a person suffering from a disease dangerous to the public health. The second section of the 1883 statute, which is substantially set forth in R. L., c. 75, § 53, virtually imposed a penalty for failure to give the notice required, by forfeiture of the right to receive reimbursement from the Commonwealth in cases of persons legally chargeable to the Commonwealth.

In view of the fact that St. 1902, c. 213, practically continues the substantive liability set forth in R. L., c. 75, § 57, it does not appear to me that the Legislature could have intended practically to repeal section 53. This view is strengthened somewhat by the express repeal found in section 3 of the 1902 act. The fact that in such a provision one section of the

Revised Laws is expressly mentioned naturally excludes the idea of repeal of other sections by implication.

Accordingly, I am of the opinion that R. L., c. 75, § 53, is law at the present time.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Fire Prevention Commissioner — Fireworks and Firecrackers — Right to prohibit Sale and Use of.

The Fire Prevention Commissioner has no power under St. 1914, c. 795, to restrain or prohibit the sale or use of fireworks or firecrackers, except where such restraint or prohibition is reasonably necessary for the prevention of fires.

MAY 22, 1917.

JOHN A. O'KEEFE, Esq., *Fire Prevention Commissioner.*

DEAR SIR: — I acknowledge your communication in which you request my opinion as to whether or not the Fire Prevention Commissioner has the right to prohibit, by regulation or otherwise, the sale and use of fireworks and firecrackers.

You refer to St. 1910, c. 565, section 2 of which provides that "cities and towns, respectively, may by ordinances and by-laws prohibit the sale or use of fireworks or firecrackers within the city or town, or may limit the time within which firecrackers and torpedoes may be used."

St. 1914, c. 795, § 3, provides that —

> All existing powers, in whatever officers, councils, bodies, boards or persons, other than the general court and the judicial courts of the commonwealth, they may be vested, to license persons or premises, or to grant permits for or to inspect or regulate or restrain the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of gunpowder, dynamite, nitroglycerine, camphine or any similar fluids or compounds, crude petroleum or any of its products, or any explosive or inflammable fluids or compounds, tablets, torpedoes, rockets, toy pistols, fireworks, firecrackers, or any other explosives, and the use of engines and furnaces described in section seventy-three of chapter one hundred and two of the Revised Laws, are hereby transferred to and vested in the commissioner.

The first question that naturally arises is whether the power granted to cities and towns under the provisions of said chapter 565, to prohibit the sale or use of fireworks and fire-

crackers, and to limit the time within which firecrackers and torpedoes may be used, was transferred to the Fire Prevention Commissioner by the provisions of said chapter 795. If such is the construction to be placed upon the act, the power of a city or town to prohibit the sale and use of fireworks and firecrackers throughout its limits has been taken away and given to the Fire Prevention Commissioner.

I think this is not a reasonable construction to place upon the act, and such construction would not be open to argument but for the use of the word "restrain" in section 3 of said chapter 795. While the word "restrain" may include the power to prohibit, ordinarily such power, when derived from the power to restrain, is limited to such prohibition as is incidental to the power to regulate.

In my judgment, the purpose of St. 1914, c. 795, as its title indicates, is for the better prevention of fires. Under the provisions of St. 1910, c. 565, cities and towns were not restricted, in the making of by-laws to prohibit the sale or use of fireworks or firecrackers, to those reasonably adapted to prevent fires. By the passage of the act cities and towns were given full power, in the exercise of local self-government, to determine whether or not fireworks and firecrackers should be sold at all, and to determine and limit the time within which firecrackers and torpedoes could be used. It was not a power of regulation, such as is given to the Fire Prevention Commissioner, to determine under what conditions they might be sold or used, but the power to pass by-laws and ordinances applicable throughout the city or town to prohibit absolutely the sale or use of fireworks and firecrackers, or to limit the time within which firecrackers and torpedoes could be used. This power, in my opinion, still remains in the cities and towns, and thus cannot be exercised by the Fire Prevention Commissioner. I think it plain, however, that, as incidental to his power to prescribe regulations not inconsistent with the first or second sections of chapter 565 of the Acts of 1910, for the keeping, storage, transportation, manufacture, sale and use of fireworks and firecrackers, he may restrain or prohibit their use where such restraint or prohibition is reasonably necessary for the prevention of fires.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Workmen's Compensation Act — Authority of Counties or Municipalities to insure their Liability thereunder.

A county, city, town or district having the power of taxation, which has accepted the provisions of St. 1913, c. 807, may insure its liability to pay the compensation therein provided for with a liability insurance company or the Massachusetts Employees Insurance Association, but cannot take out such a policy covering some of its departments and not others.

May 24, 1917.

Hon. Frank H. Hardison, *Insurance Commissioner.*

Dear Sir: — You have requested my opinion as to whether a county, city, town or district having the power of taxation, which has adopted the provisions of St. 1913, c. 807, may insure its liability to pay compensation to injured laborers, workmen and mechanics with the association created by St. 1911, c. 751, pt. IV, or with a liability insurance company, in accordance with section 3 of part V of said act, or must carry its risk directly, as a self-insurer.

Gen. St. 1915, c. 244, entitled "An Act to fix responsibility for the payment of workmen's compensation by the Commonwealth and by counties, cities, towns and districts," by section 1 required every city, town, etc., which had accepted the provisions of St. 1913, c. 807, to "designate a person to act as its agent in furnishing the benefits due under chapter seven hundred and fifty-one of the acts of the year nineteen hundred and eleven and acts in amendment thereof and in addition thereto."

Section 2 is as follows: —

> This act shall not apply to counties, cities, towns and districts which are insured under the provisions of chapter seven hundred and fifty-one of the acts of the year nineteen hundred and eleven and acts in amendment thereof.

While the language here used refers in express terms only to the present ("counties, cities, towns and districts which are insured"), it is inconceivable that the Legislature intended to exempt only those counties, cities, towns and districts, if any, which happened to be insured on the date when the act took effect. It must have been intended as of general application, effective throughout the future, and equivalent to saying that this act shall not apply to counties, cities, towns and districts which may provide insurance under the provisions of St. 1911, c. 751.

It may be that this act was passed under the impression that St. 1913, c. 807, in conjunction with St. 1911, c. 751, authorized counties, cities, towns and districts to insure the liability thereby created or permitted, and that such assumption was erroneous. However, I deem it unnecessary to determine whether or not that is the case.

As was said by the late Chief Justice Marshall, —

> A mistaken opinion of the Legislature concerning the law does not make law; but if this mistake is manifested in words competent to make the law in future, we know of no principle which can deny them this effect. *Postmaster General* v. *Early*, 12 Wheat. 136, 148.

This principle has been recognized and acted upon by other courts. *Norton* v. *Spooner*, 9 Moore, P. C., 129; *Queen* v. *Mayor of Oldham*, L. R. 3 Q. B., 474; *State* v. *Miller*, 23 Wis. 634; *Swann* v. *Buck*, 40 Miss. 268, 308; *State* v. *Eskridge*, 1 Swan (Tenn.), 413.

The question then arises whether the language of this section is broad enough to confer authority to take out insurance of this type, if that authority did not already exist.

Assuming for the moment that there was no such authority, and that that fact was known to the Legislature, it would then appear that the Legislature must have intended to grant the right to insure as a necessary implication from the language used. The exemption of a person or corporation from certain liabilities, in the event some act is done, contains in itself authority to do the act.

In any event, this section is an absolute nullity unless these districts are authorized to insure — a result which, under one of the fundamental canons of construction, is to be avoided if in any way possible.

I fail to see how the language used is any the less "competent to make the law in the future" if we assume that the Legislature was mistaken as to the existing state of the law, than if we assume the contrary. In either event the language used is the same.

It may be answered that the ultimate guide to correct statutory interpretation is the intent of the Legislature, and that this intent is different in the cases supposed, even though the language is the same. But it is the basic intent and purpose which is the real guide, and that intent, in the present case, was to exempt certain counties, cities, towns and dis-

tricts from the application of the statute. This intent is carried out only if the power to insure is held to exist.

The form of your question implies some doubt because of the limited authority of taxation conferred upon cities and towns. R. L., c. 25, § 15, besides authorizing taxation for many specific purposes, contains at the end the following words: "For all other necessary charges arising in such town." This language has been employed since 1693, and though considerably limited in its scope by the decisions of the courts, it frequently has been held to include matters in which "a town or city has a duty to perform, an interest to protect, or a right to defend." *Waters* v. *Bonvouloir*, 172 Mass. 286, 288.

In *Dunn* v. *Framingham*, 132 Mass. 436, 437, it is said: —

> Therefore, whenever the Legislature confers a power or imposes a duty upon towns, this clause applies and gives the towns authority to grant money which is required to enable them to execute the power or to perform the duty.

If the Legislature has authorized insurance in this class of cases, that authorization carries with it the right to expend moneys for the purpose, and to obtain those funds by taxation.

Accordingly, though with some hesitation, I have come to the conclusion that your first question is to be answered in the affirmative.

You also ask whether a municipality has the right to take out a workmen's compensation policy with an insurance company covering the laborers, workmen and mechanics of some of its departments and not such employees in other departments.

The language of neither St. 1913, c. 807, nor St. 1911, c. 751, contains any suggestion that employees of a single employer may be divided into classes, one of which shall be protected in one manner and others in another. The original idea, upon the basis of which St. 1911, c. 751, was framed, was of one insurance company, in which all employers who came under the act should insure all their employees.

Part V, section 2, of that statute defines "employee" as including "every person in the service of another," with certain exceptions not here material. Under part II of the act "employees" of subscribers are given certain rights of compensation. Part V, section 3, permits liability insurance companies "to insure the liability to pay the compensation provided for by part two."

In my opinion, when insurance is provided under this act it applies, subject to exceptions immaterial to this discussion, to all employees of the employer obtaining the insurance, and there is no ground for excepting part of such employees by their division into departments or otherwise. Cox's Case, 225 Mass. 220.

It is perhaps needless to point out that this question does not relate to a policy of indemnity, but only to a workmen's compensation policy, under which the insurance company takes the place of the "association," under the provisions of St. 1911, c. 751.

It follows that in my opinion your second question is to be answered in the negative.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Corporations — Issue of New Stock — Right of Stockholders to participate proportionately — Constitutional Law.

A statute which purports to authorize a railroad corporation to issue certain preferred stock, exchangeable for common stock, without the consent of certain stockholders who are denied the right to participate in such issue, is unconstitutional in so far as it affects the value of the shares of such stockholders by reducing their interest in the property of the corporation.

MAY 24, 1917.

Hon. CLARENCE W. HOBBS, JR., *Chairman, Joint Committee on Railroads.*

DEAR SIR: — I acknowledge your communication in which the Committee on Railroads requests my opinion upon certain questions raised by a proposed amendment to section 1 of House Bill No. 2061. The bill provides as follows: —

SECTION 1. The New York, New Haven and Hartford Railroad Company is authorized, for the purpose of paying its indebtedness, to issue, subject to approval of the public service commission and the provisions of chapter two hundred and ninety-nine of the General Acts of the year nineteen hundred and fifteen, shares of preferred stock of the par value of one hundred dollars each, upon which the company may pay dividends out of its net income.

SECTION 2. Said preferred stock may be issued under such provisions for future retirement or exchange for common stock as may be authorized by a vote of stockholders holding not less than two-thirds of the stock of such company and approved by the public service commission.

The amendment proposed adds at the end of section 1 the following: —

Provided, however, that if such preferred shares entitle the holders to any voting power, no railroad corporation or railroad holding company or express company, whether organized under the laws of this commonwealth or any other state, shall directly or indirectly subscribe for, purchase or hold any such preferred shares, and upon the offer of such preferred shares to the stockholders of the New York, New Haven and Hartford Railroad Company any railroad corporation, railroad holding company or express company which is a stockholder shall be excluded from such offer.

Your specific questions are as follows: —

1. As to whether the New York, New Haven & Hartford Railroad Company could lawfully comply with the proviso if incorporated into the act.
2. As to whether non-compliance with the proviso would result in the New York, New Haven & Hartford Railroad Company losing the right conferred by the act to pay dividends out of its net earnings.

I assume from your inquiry that certain railroad corporations, railroad holding companies and express companies are at present stockholders of the New York, New Haven & Hartford Railroad Company.

The effect of the proposed amendment is to provide, as a requirement of the new issue of the preferred shares, that none of such shares shall be offered to or held by a railroad corporation, a railroad holding company or an express company.

You have called my attention to the cases of *Gray* v. *Portland Bank,* 3 Mass. 363, and *Atkins* v. *Albree,* 12 Allen, 359. The effect of these decisions is that each stockholder has a vested right to participate proportionately in any augmentation of the capital of the corporation, at least where new stock is sold at less than its true value. The reason of this is plain. In a sense stockholders are partners. Their interest in the partnership and the partnership property is represented by the shares they hold, and if it were permissible for those in control of the corporation so to increase the capital without giving to all stockholders an opportunity to participate proportionately in such increase, the interest of the stockholders denied the opportunity to participate would arbitrarily be changed, and a part of their interest in the corporation would

thereby be taken away from them. It would in effect be a taking of property without due process of law.

In this Commonwealth there is a reserve power in the Legislature to amend or alter the charter of a corporation, but this power has some limitations, and it cannot be exercised so as to take away property of the corporation or of the stockholders. *Commonwealth* v. *Essex Co.*, 13 Gray, 239, 253. It follows, that, in order to increase the capital stock under authority of the Legislature, it must be done in such a way as not to impair the value of the stock of shareholders who are denied the right to participate in the new issue.

So far as the proposed amendment may affect participation in the control and management of the property of the corporation, I am inclined to the view that it is free from objection. Statutes affecting this right have in the past been enacted and have operated in this Commonwealth without question. An illustration is St. 1908, c. 636, § 2, which provides that if the increase in the capital stock does not exceed 4 per cent. of the existing capital stock it may be sold at public auction without first offering the same to the stockholders. St. 1871, c. 392, provided that any increased stock should be sold at public auction. This was the only manner in which increased stock in a railroad corporation could be sold from that time until the passage of St. 1878, c. 84, which provided that such increased stock might first be offered to the stockholders. By St. 1893, c. 315, it was provided that stock in railroad corporations should first be offered to the stockholders, except that where the increase did not exceed 4 per cent. it might be sold at public auction without first offering the same to the stockholders.

So far, however, as the bill, as amended, affects the value of shares of present stockholders by reducing the interest of such stockholders in the property of the corporation, I am of the opinion that it would be unconstitutional if construed as authorizing the issue of the new stock without the consent of the stockholders denied the right to participate.

The question of whether the issuance of this stock in the manner proposed would have this effect is complicated by the provision in the bill that the new stock may be issued exchangeable for common stock. This is a question of fact which, obviously, I am not in a position to determine.

Accordingly, I am of the opinion that if the bill has the effect above indicated, and is construed to authorize the issue

without the consent of stockholders who are denied the right to acquire such stock, your first question is to be answered in the negative; otherwise, in the affirmative.

The answer to your second question, in the first instance, is in the affirmative, and in the second it is in the affirmative as to such stock as may be held by railroad corporations, railroad holding companies and express companies.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Constitutional Law — Equal Protection of the Laws — Exemption of Farmers or Agriculturists from General Anti-trust Act.

A general anti-trust bill which exempts agreements between farmers or other persons engaged in agricultural pursuits, relative to the sale of products of their own lands, would be unconstitutional if enacted into law, as denying to all persons within the State the equal protection of the laws, in violation of article XIV of the Amendments to the Constitution of the United States.

MAY 24, 1917.

His Excellency SAMUEL W. MCCALL, *Governor of the Commonwealth.*

SIR: — You have requested my opinion upon the constitutionality of an act entitled "An act to prohibit combinations and monopolies to control prices of commodities in common use," which has been passed by both branches of the General Court and is now awaiting the approval of Your Excellency. This act is as follows: —

SECTION 1. Whoever agrees or combines with another to fix or control the price at which any commodity or article in common use shall be sold by any person, or to refrain from competition with any person in the buying or selling of any such commodity or article, and whoever monopolizes or attempts to monopolize, or combines or conspires with any other person to monopolize, any such article or commodity, shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the house of correction for not more than three years.

SECTION 2. The provisions of this act shall not apply to agreements between vendor and vendee as to the price at which such goods are sold by the vendor to the vendee; nor to agreements between persons owning property jointly or in common as to the price at which such property shall be sold; nor to agreements between the vendor and vendee, in connection with the sale of the good-will of a business,

which are reasonably necessary for the preservation and protection of the property which is sold; nor to agreements between farmers, or other persons engaged in agricultural or horticultural pursuits, relative to the sale of the products of their own farms; nor shall the labor of a person be considered a commodity or article in common use, within the meaning of this act.

Section 3. The provisions of this act shall apply to, and the word "person" as used herein shall include, corporations.

Section 4. The provisions of this act shall remain in force only for the duration of the existing state of war.

House Bill No. 1805, from which this act originated, was reported on March 16, 1917, by the joint committee on the judiciary, and enacted by the House of Representatives in form identical with the first three sections of the present act. While the bill was in the committee on bills in the third reading of the Senate I advised the Hon. Alpheus Sanford, chairman of that committee, and the Hon. James F. Cavanagh, chairman of the joint committee on the judiciary, under date of April 5, 1917, that the bill, if enacted in the form it was then in, would, under the decision of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, be unconstitutional, and recommended that the exemption of agreements between farmers or other persons engaged in agricultural or horticultural pursuits, relative to the sale of the products of their own farms, should be stricken out, in order to insure the constitutionality of the bill under the Connolly case. On the same day the Senate committee on bills in the third reading reported the bill, recommending that this be done, and the bill was accordingly passed by the Senate, with the exemption of agreements between farmers or other persons engaged in agricultural or horticultural pursuits, relative to the sale of the products of their own farms, stricken out. The House of Representatives non-concurred in this amendment, and the bill was thereupon referred to the committee on conference. This committee reported under date of May 15, 1917, recommending that the Senate recede from its amendment, and that the bill be amended by adding the following new section: —

Section 4. The provisions of this act shall remain in force only for the duration of the existing state of war.

This report was accepted by both branches of the General Court and enacted in its present form.

If the question of whether the exemption from the operation of a general anti-trust bill, of agreements between farmers or other persons engaged in agricultural pursuits, relative to the sale of the products of their own lands, would be such an arbitrary discrimination as to render the bill unconstitutional, as denying to all persons the equal protection of the laws, were to arise now for the first time, it might be contended with much force that this exemption amounted to no more than a reasonable classification, on the ground that it was not within the evil sought to be remedied, since agricultural producers must dispose of their stock quickly and have no facilities for combinations. This contention is, however, now concluded by the Connolly case, *supra* (1902), in which the Supreme Court of the United States flatly decided that section 9 of an anti-trust statute of Illinois of 1893, which provided that "the provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser," created an arbitrary discrimination in favor of farmers and stock raisers, and denied to the other persons falling within the scope of the bill the equal protection of the laws, guaranteed by our Federal Constitution. It further decided that this had the effect of rendering the entire act unconstitutional, since the first section of the act embraced within its terms all persons, firms, corporations or associations; and if section 9 were eliminated as unconstitutional, then the act, if it stood, would apply to agriculturists and live stock dealers, which result the Legislature could not be held to have intended.

The Supreme Court of the United States, in the case of *International Harvester Co.* v. *Missouri*, 234 U. S. 199 (1914), decided that the exemption of labor unions from such a bill was constitutional, but cited with approval and reaffirmed the Connolly case.

This case is decisive of the present question, unless the effect of section 4 of our act is to create a sound reason for the difference in treatment accorded to farmers or agriculturists and all other persons included in the act.

It is difficult to see how such an emergency justifies the difference in treatment between these classes, and, accordingly, I am of the opinion that the act in question would be unconstitutional if allowed to become a law.

Yours truly,

HENRY C. ATTWILL, *Attorney-General.*

Constitutional Law — Compulsory Workmen's Compensation Act — Right to Trial by Jury — Police Power.

A statute making it compulsory for all employers in this Commonwealth to take out insurance under the workmen's compensation act (St. 1911, c. 751), but allowing employees to claim their common law rights under the existing compensation act, would be unconstitutional, as an unreasonable exercise of the police power.

A workmen's compensation act compulsory alike upon employer and employee would be constitutional, if limited to extra hazardous occupations and excluding persons engaged in interstate commerce, although making no provision for a trial by jury.

May 25, 1917.

Hon. Channing H. Cox, *Speaker of the House of Representatives.*

Dear Sir: — I acknowledge an order from the honorable House of Representatives in the following form: —

Ordered, That the House of Representatives hereby requests the opinion of the Attorney-General on the following question of law: Would House Bill No. 973 of the current year, being "An Act to require all employers coming under the provisions of the workmen's compensation act to insure for the protection of their employees," if enacted into law be valid and in accordance with the provisions of the Constitution of the Commonwealth and of the United States?

The bill referred to is as follows: —

Section 1. All employers shall secure compensation to their employees by becoming and continuing as subscribers in the association or in some stock or mutual liability insurance company authorized to do business within this commonwealth.

Section 2. If an employer shall be in default under the provisions of the preceding section for a period of thirty days, he may be enjoined by the superior court from carrying on his business while such default continues.

This bill, in my opinion, is not in proper form for enactment, since its meaning and application cannot be determined except by reference to the title. If the bill is to be enacted, section 1 should be so drawn as to refer in terms to the workmen's compensation act and its amendments. It has been called to my attention, however, that this bill has been referred to the next General Court, and, accordingly, I assume that my opinion is desired not so much with reference to a bill in this particular form as for use in connection with some legislative action looking toward the enactment of legislation

along the general lines suggested by this bill. I therefore discuss the question presented by the order as a general proposition, without reference to the particular phraseology of the bill.

I assume that the purpose of this order is to obtain an opinion as to whether a statute may be enacted requiring all persons having in their service employees who are entitled to the benefits of the workmen's compensation act (St. 1911, c. 751) and its amendments to take out insurance under its provisions. In other words, the question is: Can the provisions of this statute, by which an employer is given the right to elect as to whether he will bring himself within the statute by subscribing to the Massachusetts Employees Association or insuring with some other liability insurance company, be so amended as to require him thus to insure, without modifying the other features?

The workmen's compensation act now in force in this Commonwealth is entirely elective in character, both as to employers and as to employees. An employer may insure under its provisions or not, as he chooses. If he does not elect to do so, his employees, in case of injury, obtain more extensive rights against him than they otherwise would have, since, in that event, an employer is deprived of any defence on the ground that the employee was negligent, or that the injury was caused by a fellow servant, or that the employee assumed the risk. If the employer elects to insure, the employee is given the right to choose whether he will come within the provisions of the act and take the benefit of the insurance or not. On entering the employment or, if the employer insures after the employee has been hired, within thirty days after such insurance, the employee may claim his common law rights by notice in writing. If he fails to do so, he is held to have chosen to accept the benefits of the act. If he affirmatively elects not to accept the benefits of the act, in case of injury he obtains only his common law rights as they existed before the enactment of the employers' liability act. Thus it will be seen that the existing act gives both employer and employee a right to choose whether they will come within the provisions or not, although an attempt has been made to induce both parties to choose in favor of the act by making the results of that choice in the ordinary case more attractive than the results of the opposite course.

The effect of the proposed bill is merely to deprive the em-

ployer of his right to elect not to come within the provisions of the act. The bill requires him to subscribe to the Massachusetts Employees Association or otherwise to insure, under penalty of being enjoined from carrying on his business if he fails to do so. The bill, however, leaves the remainder of the act entirely unaffected, and thus still leaves to the employee the right, upon entering the service or upon notice that the employer is insured, to choose whether he will come within the provisions of the act or not.

It was largely because of its elective character that the workmen's compensation act, as originally enacted, was sustained by the Supreme Judicial Court as constitutional. *Opinion of the Justices,* 209 Mass. 607; *Young* v. *Duncan,* 218 Mass. 346.

The court has never had occasion to pass upon the question as to whether an act compulsory in any of its features could constitutionally be enacted. It is my opinion, however, that a law which requires all employers and employees who come within its scope to submit to its provisions is not beyond the power of the General Court, if such act is properly drawn and properly limited. This is made plain, so far as the Federal Constitution is concerned, by two recent decisions of the United States Supreme Court.

In *New York Central R.R. Co.* v. *White,* 243 U. S. 188, the court unanimously sustained the workmen's compensation law of the State of New York. That law establishes forty-two groups of hazardous employments, and requires all employers and employees in such groups to comply with its provisions and to submit to the exclusive provisions for compensation which it establishes in case of personal injury. Aside from the fact that the law is compulsory in its application to all persons coming within its scope, the system of compensation provided and the method of administering it are analogous to those established by our act. This statute, however, permitted an employer to secure compensation to his employees by (1) insuring in a State fund established by the act; or (2) insuring in any stock or mutual insurance company authorized to transact such business in the State; or (3) paying the compensation provided by the act himself, the right to make this latter election being conditioned upon furnishing satisfactory proof to the commission of his financial ability to pay, and, if required, upon depositing security with the commission. The court held that it is within the power of the States entirely to

set aside the rights and liabilities of employers and employees in accident cases, as they exist at common law, at least provided that some reasonably just substitute is given therefor. It held that the substitute provided, of compensation upon a fixed and reasonable basis in all cases of injury, whether with or without fault, short of intentional injury on the part of either the employer or employee, was not an unreasonable nor an arbitrary scheme. In view of the fact that this statute gave to an employer a reasonable opportunity to subject himself only to liability to his employees, instead of bearing through insurance the burdens of all industrial accidents in industries of his class, none of the judges appear to have had any doubt as to the reasonable character of the statute in the liability which it imposed on employers.

In *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, the court sustained the compensation act of the State of Washington, four justices dissenting. This statute was similar in character to the New York statute, and, like that statute, was applicable only to certain classes of employments expressly recognized as "extra hazardous." It differed, however, from the New York statute in one essential feature, namely, all employers were required to secure compensation to their employees through contributions to a State fund established by the act for the purpose of insuring payments of compensation under it. This statute was thus in all respects compulsory, and required each employer coming within its scope to contribute toward the payment of compensation to all employees in industries of his class, entirely without reference to whether they received their injuries in his employ or not. In dealing with this additional feature of the Washington statute the court says: —

> We are clearly of the opinion that a State, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability with consequent loss of earning power among the men and women employed, and, occasionally, loss of life of those who have wives and children or other relations dependent upon them for support, and may require that these human losses shall be charged against the industry, either directly, as is done in the case of the act sustained in *New York Central R.R. Co.* v. *White*, *supra*, or by publicly administering the compensation and distributing the cost among the industries affected by means of a reasonable system

of occupation taxes. The act cannot be deemed oppressive to any class of occupation, provided the scale of compensation is reasonable, unless the loss of human life and limb is found in experience to be so great that if charged to the industry it leaves no sufficient margin for reasonable profits. But certainly, if any industry involves so great a human wastage as to leave no fair profit beyond it, the State is at liberty, in the interest of the safety and welfare of its people, to prohibit such an industry altogether.

It is to be noted that in sustaining this statute the court emphasizes the fact that it is applicable only to persons engaged in "industrial occupations that frequently and inevitably produce personal injuries and disability;" or, in other words, to extra hazardous occupations. This emphasis strongly suggests that if this statute had applied to all occupations, without reference to the hazard involved, it would have been declared invalid by the court.

These decisions of the Supreme Court of the United States make it plain that a workmen's compensation act enacted in this Commonwealth, applicable only to extra hazardous employments, and compulsory as to all employers and employees engaged in such industries, would not be in violation of the Constitution of the United States.

The fundamental rights guaranteed by the Declaration of Rights of the Constitution of Massachusetts are in substance the same as those protected by the Fourteenth Amendment to the Federal Constitution. In *Commonwealth* v. *Strauss*, 191 Mass. 545, 550, the Supreme Judicial Court said: —

> The rights relied upon under the Fourteenth Amendment to the Constitution of the United States, and under the Declaration of Rights in the Constitution of Massachusetts, are substantially the same.

Though our court, in interpreting and applying the provisions of the Massachusetts Constitution to such a statute, is the final authority and is not bound by the decisions of the Supreme Court of the United States, yet in view of the high authority of that court and its clear reasoning in these cases it seems highly probable that our Supreme Judicial Court would arrive at the conclusion that such a statute is not inconsistent with our Declaration of Rights.

The enactment of such a compulsory law would, however, raise one serious question not involved in the decisions referred to, namely: Would a compulsory law, administered,

like the present law, by a State board which determines all questions of fact, be a violation of the right to a trial by jury guaranteed by the Massachusetts Constitution? Article XV of the Declaration of Rights is as follows: —

> In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it.

It would seem that in the light of these decisions a controversy as to the extent of the injury of an employee and the amount of compensation which he is entitled to receive therefor under such an act is not a controversy concerning property, within the meaning of this provision; nor, in my opinion, is a proceeding before an industrial accident board for the arbitration of disputed questions of fact arising between an employee and an insurance company, on a claim for compensation under a compulsory compensation act applicable to hazardous businesses, a suit between two or more persons, within the meaning of this provision. Neither the committee of arbitration provided for by the act nor the Industrial Accident Board is a court in the strict sense of the word, nor are their members judicial officers, within the meaning of the Constitution. *Pigeon's Case*, 216 Mass. 51, 56. The proceedings before these bodies are hearings before administrative boards authorized to make determinations of fact in the administration of the act, rather than trials of suits between two or more persons.

In my opinion, however, this matter need not be put on any narrow ground. It being held, as has been done by the Supreme Court of the United States, that actions of law between employers and employees in hazardous occupations may be abolished, and a reasonable system of compensation administered by a public board substituted therefor, it would seem to follow that where such system has been established the constitutional right to a trial by jury of questions of fact relating to such matters no longer exists. Rights of action within the scope of the system have been abolished, and, therefore, there can be no suit between parties to be determined by a jury. As the court said in *Mountain Timber Co.* v. *Washington*, at page 235: —

As between employee and employer, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury.

This was also the view expressed by the Supreme Court of the State of Washington in sustaining the same law. *State* v. *Mountain Timber Co.*, 75 Wash. 581.

A fundamental feature of all workmen's compensation laws is that so far as possible they shall work automatically, the amount of compensation being readily ascertainable when the extent of the injury is known. It is essential to the proper administration of these laws that, except so far as questions of law arise, they should be executed without the intervention of the courts. To sustain as reasonable the scheme substituted for the common law liability of the employer, and to deny the validity of a fundamental feature of its method of administration, can be regarded only as an absurd result. In my opinion, a properly limited compulsory workmen's compensation law would not be inconsistent with the provision of our Constitution guaranteeing a trial by jury.

Accordingly, I reach the conclusion that a compulsory workmen's compensation law similar either to that in force in New York or in Washington would be valid if enacted in this Commonwealth.

The proposed legislation referred to in the order of the House does not, in my opinion, make the existing workmen's compensation law of this Commonwealth a compulsory law such as those I have described. House Bill No. 973 or any similar measure, if enacted into law, would apply its compulsory provisions only to employers. It would still leave to employees their right under the existing compensation act to elect their common law rights under the methods provided by the existing act, and thus to subject their employers to actions at law for damages in proper cases. Employers, on the other hand, would be required by such enactment to obtain insurance under the compensation act, and thus each employer would be required to bear his share of the burdens of all industrial accidents in his industry, whether caused to his employees or not, and at the same time be required to run the risk of suits by any of his employees who choose to claim their common law rights. The only remedy of the employer would be to refuse to hire, or to discharge, any person who claimed such rights. It seems to me that to make the law compulsory

as to the employer and elective as to the employee is an arbitrary discrimination and not a reasonable application of the police power. It does not appear to find justification in any industrial condition that has been called to my attention.

Furthermore, our present compensation act applies to all employees except domestic servants and farm laborers. If the proposed compulsory insurance provisions were added to it, every person in the Commonwealth having one or more employees other than domestic servants or farm laborers would be required to secure insurance under the act. This compulsory feature would apply to all employments, whether to any appreciable extent hazardous or not. The small merchant with one clerk, the business or professional man with but one stenographer, or with only an office boy, and every other business man in the Commonwealth, no matter how trivial were the risks run by his employees in the course of their employment, would be required to insure under the act. I know of no conditions which warrant any such compulsion. The decisions of the Supreme Court of the United States to which I have referred are based largely upon the fact that the laws there under consideration are confined in their operation to industries reasonably classified as extra hazardous. In my opinion, a compulsory law applicable to all employees except domestic servants and farm laborers would be held to be unconstitutional, as an unreasonable exercise of the police power.

The proposed bill is extremely broad in its terms, and appears to apply even to persons and corporations engaged in interstate commerce. Very recent decisions of the Supreme Court of the United States indicate that if given such a broad application the statute would be to that extent in violation of the Federal Constitution. If legislation of this sort is to be enacted, it should expressly be made inapplicable to persons engaged in interstate commerce.

If a valid compulsory workmen's compensation law is enacted, I can see no reason why an employer who fails to comply with its provisions may not be subjected to the penalty of an injunction restraining him from further conducting his business until he has so complied, in the general manner provided by the second section of this bill.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Taxation — Income Tax — Deposits in Savings Departments of Trust Companies.

Under Gen. St. 1916, c. 269, § 2 (a), 1st, interest on deposits in the savings departments of trust companies is exempted from the income tax only when the amounts of such deposits do not exceed the limits upon deposits in savings banks.

May 31, 1917.

Hon. W. D. T. Trefry, *Tax Commissioner.*

Dear Sir: — You request my opinion as to whether the provision of Gen. St. 1916, c. 269, § 2 (a), 1st, relating to the exemption from the income tax of the interest on certain deposits in the savings departments of trust companies, applies only to the interest on accounts of individual depositors not in excess of the limits imposed upon deposits in savings banks, or whether it is applicable to interest on such part of all accounts as does not exceed in amount such limits.

The exemption provision to which you refer is as follows: —

> Deposits in any savings bank chartered by this commonwealth or in the Massachusetts Hospital Life Insurance Company, or such of the deposits in the savings department of any trust company so chartered as do not exceed in amount the limits imposed upon deposits in savings banks by section forty-six of chapter five hundred and ninety of the acts of the year nineteen hundred and eight, and acts in amendment thereof and in addition thereto.

The words which require interpretation are "such of the deposits in the savings department of any trust company . . . as do not exceed in amount the limits imposed upon deposits in savings banks." This language must be construed in connection with the statutes relating to the establishment and taxation of such departments of trust companies.

The establishment of savings departments by trust companies was authorized and their conduct regulated by St. 1908, c. 520. No provision, however, was included for the imposition of an excise tax on such deposits nor for their exemption from taxation to the depositor.

By St. 1909, c. 342, it was provided as follows: —

> Section 1. Every trust company having a savings department, as defined by chapter five hundred and twenty of the acts of the year nineteen hundred and eight, shall pay to the treasurer and receiver general on account of its depositors in such department, an annual tax on the amount of its deposits therein, to be assessed and paid at the

rate, in the manner, and at the times specified in chapter fourteen of the Revised Laws and acts in amendment thereof and in addition thereto, for the taxation of deposits in savings banks, except that in the year nineteen hundred and ten the rate of said tax shall be one eighth of one per cent, in the year nineteen hundred and eleven one quarter of one per cent, and in the year nineteen hundred and twelve three eighths of one per cent.

. . . . . .

Section 4. All deposits taxed under the provisions of section one of this act shall otherwise be exempt from taxation in any year in which said tax is paid.

As no limit upon the amount of deposits in the savings departments of trust companies is imposed by law, the foregoing statute was apparently thought too favorable for such depositors, and, accordingly, by St. 1911, c. 337, § 1, it was provided as follows: —

The tax imposed by section one of chapter three hundred and forty-two of the acts of the year nineteen hundred and nine shall apply only to such of the deposits therein designated as do not exceed in amount the limits imposed upon deposits in savings banks by section forty-six of chapter five hundred and ninety of the acts of the year nineteen hundred and eight and acts in amendment thereof and in addition thereto.

It is to be noted that the provision of the income tax law under consideration adopts the essential language of the statute just quoted. In *Old Colony Trust Co.* v. *Commonwealth*, 220 Mass. 409, 411, the court stated the effect of this last-mentioned statute to be as follows: —

The law as to the excise tax, which is the growth of many years, thus is made applicable only to that part of the deposits in the savings departments of trust companies which corresponds with savings bank deposits in amounts from individual depositors.

It is conceded that it has always been the practice of your department and of the trust companies maintaining savings departments to interpret this statute as subjecting to the excise tax only the total amount of the accounts in which deposits do not exceed the savings bank limits. The opinion in the case referred to plainly indicates that that is the proper construction of the statute. It follows that before the enactment of the income tax law only such accounts as did not

exceed the savings bank limits were exempt from taxation to the depositors. In my opinion, it was plainly the purpose of the income tax law, in adopting the language of the statute of 1911, merely to adopt this exemption and not in any way to extend it.

It follows, in my opinion, that the income tax law should be construed as exempting from taxation only the income from such accounts in the savings departments of trust companies as do not exceed in the amount of their deposits the limits imposed upon deposits in savings banks.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Constitutional Convention — Oath of Office.

Members of the Constitutional Convention are not required by law to take any oath of office.

JUNE 5, 1917.

His Excellency SAMUEL W. MCCALL, *Governor of the Commonwealth.*

SIR: — You request my opinion upon the question of whether the persons who have been elected delegates to the convention to revise, alter or amend the Constitution of Massachusetts, under the provisions of Gen. St. 1916, c. 98, are required to take any oath before entering into the performance of their duties as such delegates.

Both the act providing for the convention and the statute law of the Commonwealth are silent upon this question, so that if required at all, it must be by virtue either of the Constitution of the United States or of our Constitution.

Article VI of the Constitution of the United States provides, in part, as follows: —

> The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution.

In my opinion, this article does not apply to the position of delegate to the convention in question, for the reason that the convention cannot be said to be a State Legislature, nor can the delegates elected thereto be said to be executive or judicial officers.

Mass. Const., pt. 2d, c. VI, art. I, provides:

> Every person chosen to either of the places or offices aforesaid [governor, lieutenant-governor, councillor, senator, or representative], as also any person appointed or commissioned to any judicial, executive, military, or other office under the government, shall, before he enters on the discharge of the business of his place or office, take and subscribe the following declaration, and oaths or affirmations, viz.:
>
> . . . . . .
>
> "I, A. B., do solemnly swear and affirm, that I will faithfully and impartially discharge and perform all the duties incumbent on me as , according to the best of my abilities and understanding, agreeably to the rules and regulations of the constitution and the laws of the commonwealth. So help me, God."

It is obvious that this article does not apply to the position of delegate to the Constitutional Convention.

The only other provision of our Constitution bearing upon this question is article VI of the Amendments to the Constitution of Massachusetts, which provides, in part, as follows: —

> Instead of the oath of allegiance prescribed by the constitution, the following oath shall be taken and subscribed by every person chosen or appointed to any office, civil or military, under the government of this commonwealth, before he shall enter on the duties of his office, to wit: —
>
> "I, A. B., do solemnly swear, that I will bear true faith and allegiance to the Commonwealth of Massachusetts, and will support the constitution thereof. So help me, God."

It is to be noted that this article applies only to offices under the government of this Commonwealth. In an opinion rendered under date of Feb. 19, 1917, I advised the joint committee of the Legislature on constitutional amendments that the position of delegate to this convention was not an office under the government of this Commonwealth, within the meaning of article VIII of the Amendments of our Constitution, for the reason that the word "office," as used in that article, referred to a position the incumbent of which exercises some power of the existing government and not to the position of a person selected to act in an advisory capacity in framing a scheme or change of government to be submitted to the people for adoption or rejection. The meaning of the

phrase "office under the government of this commonwealth," as used in articles VI and VIII of the Amendments, is undoubtedly the same, as both these articles were drafted at the same time by the same convention. I am of the opinion, therefore, that the position of delegate to this convention is not an office under the government of this Commonwealth, within the meaning of article VI of the Amendments to our Constitution.

Accordingly, I am of the opinion that no oath or affirmation is required by law to be taken by delegates to the Constitutional Convention. I am fortified in this opinion by reason of the fact that it does not appear that the delegates to the convention of 1820 or the convention of 1853 took any oaths of office or otherwise, nor that it was contended that they were bound by law to do so. The convention may, of course, if it deems it fitting and appropriate to do so, prescribe oaths to be taken by its members, but this is a matter which, in my judgment, rests entirely within the discretion of the convention itself.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

War Service — State Pay — Woman Yeoman.

A woman who enlists in the navy as a yeoman is not a soldier or sailor within the meaning of Gen. St. 1917, cc. 211 and 332.

JUNE 6, 1917.

Hon. CHARLES L. BURRILL, *Treasurer and Receiver-General.*

DEAR SIR: — You ask my opinion as to whether a woman who enlists in the navy as a yeoman is entitled to State pay under the provisions of Gen. St. 1917, c. 211, as defined and extended by Gen. St. 1917, c. 332.

As I understand it, the duties performed by a woman so enlisting are the ordinary duties performed by a stenographer or a clerk. In my opinion, a woman who performs such duties is not a soldier or a sailor, within the meaning of these statutes.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

War Service — Scope of Statutes providing for State Pay to Persons in.

Gen. St. 1917, c. 211, providing for State pay of $10 a month to certain persons mustered into the military or naval service of the United States "as a part of the quota of this Commonwealth," applies only to non-commissioned officers, soldiers and sailors of the National Guard of the Commonwealth, including therein any naval militia maintained by the Commonwealth, who have been mustered into the Federal service.

Gen. St. 1917, c. 332, extends the benefits conferred by c. 211 to any non-commissioned officer or enlisted man who enlists or re-enlists as a resident of this Commonwealth in the regular or volunteer forces of the United States Army, Navy or Marine Corps subsequent to Feb. 3, 1917, and who has been for at least six months legally domiciled in the Commonwealth, although such enlistment or re-enlistment actually takes place in another State.

June 6, 1917.

Hon. Charles L. Burrill, *Treasurer and Receiver-General.*

Dear Sir: — You have asked my opinion as to several questions which have arisen in carrying out the provisions of Gen. St. 1917, c. 211, as defined and extended by Gen. St. 1917, c. 332.

Section 1 of chapter 211 provides, in part, as follows: —

There shall be allowed and paid out of the treasury of the commonwealth to each non-commissioned officer, soldier and sailor, who has been, or is hereafter, mustered into the military or naval service of the United States as a part of the quota of this commonwealth for service in the United States or in any foreign country, the sum of ten dollars per month. . . .

Section 1 of chapter 332, for the purpose of carrying out the foregoing provision, defines the war with the German Empire as having begun Feb. 3, 1917, and then provides as follows: —

And any non-commissioned officer or enlisted man having a residence of at least six months within this state and serving to the credit of this commonwealth in the regular or volunteer forces of the United States army, navy or marine corps, whose federal service began subsequent to said February third, nineteen hundred and seventeen, is eligible under the provisions of the above acts.

The first question to be decided in determining the persons who are entitled to receive State pay under the provisions of these statutes is the proper interpretation of the words "as a

part of the quota of this commonwealth," as they appear in chapter 211.

The word "quota" implies allotment or assignment of a certain specified number of men which it is the duty of the Commonwealth to raise for the military or naval service of the United States. So far as I am aware, the only quota of this character in any manner as yet assigned to the Commonwealth by the Federal government grows out of the provision for the maintenance of a portion of the National Guard by the Commonwealth. Section 62 of the Act of Congress approved June 3, 1916, entitled "An Act for making further and more effectual provision for the national defense and for other purposes," provides that the number of enlisted men of the National Guard to be organized by each State within one year from the passage of that act in accordance with its provisions shall be in the proportion of 200 men for each senator and representative in Congress from the State, and further provides that this number shall be increased not less than 50 per centum in each year thereafter until a total peace strength of not less than 800 enlisted men for each senator and representative shall have been reached.

Section 117 of this act, in authorizing the formation of a naval militia, contains the following proviso: —

> *Provided*, that each state, territory or district maintaining a naval militia, as herein provided, may be credited to the extent of the number thereof in the quota that would otherwise be required by section sixty-two of this act.

This provision plainly seems to indicate that the word "quota" is there used to indicate the total number of enlisted men of the National Guard which each State is required to raise.

In my opinion, therefore, the provision for State pay, contained in chapter 211, applies at present only to the non-commissioned officers, soldiers and sailors of the National Guard of the Commonwealth, including therein any naval militia maintained by the Commonwealth, who have been mustered into the Federal service. It applies, however, to all such persons, without condition as to length of residence in the Commonwealth.

Chapter 332 does two things: It first defines the date of the beginning of the war with the German Empire as February 3 last; and, in the second place, it somewhat extends the

right to receive State pay granted by chapter 211. It provides that, in addition to the persons entitled to State pay under chapter 211, any non-commissioned officer or enlisted man having a residence of at least six months within this State and serving to the credit of the Commonwealth in the regular or volunteer forces of the United States Army, Navy or Marine Corps shall be entitled to that pay, provided his Federal service began subsequent to the beginning of the war, defined as being upon the 3d of February. This provision, in my opinion, extended the right to receive State pay to all persons enlisting in the United States Army, Navy or Marine Corps subsequent to February 3, provided such persons had at the time of their enlistment been residents of the Commonwealth for at least six months. By its terms, however, it does not apply to persons who had enlisted in the United States Army, Navy or Marine Corps prior to the 3d of February.

In my opinion, the condition of residence for six months within the Commonwealth, applicable only to the additional persons entitled to State pay under chapter 332, must be interpreted as requiring that the applicant for such State pay shall have been legally domiciled within the Commonwealth for a period of at least six months before his enlistment.

A question of some difficulty arises in determining when the Federal service of an applicant under chapter 332 began where his original enlistment was before the beginning of the war and has been followed by a re-enlistment after February 3 and immediately at the expiration of his original term of service, so that in a sense his Federal service has been of continuous duration. On the whole, however, in view of the obvious purpose of the statute to encourage enlistments of citizens of the Commonwealth, it is my opinion that the term "Federal service," as used in this statute, should refer only to service under the current enlistment of the applicant.

Accordingly, in case of re-enlistment after the beginning of the war, the enlisted man, if then legally resident in the Commonwealth for the required period, is entitled to State pay.

The result of the foregoing is that all non-commissioned officers, soldiers and sailors who have been mustered into the military or naval service of the United States as a part of the National Guard of the Commonwealth, including in that description any naval militia of the Commonwealth, for service in connection with the war with the German Empire, are

entitled to State pay from the time when they entered the service of the United States, without reference to their legal residence. In addition to the foregoing, any non-commissioned officer or enlisted man who enlists or re-enlists in the regular or volunteer forces of the United States Army, Navy or Marine Corps subsequent to Feb. 3, 1917, is entitled to such pay, provided that, at the time of the beginning of his Federal service by such enlistment or re-enlistment, he has been for at least six months legally domiciled in the Commonwealth and enlisted as a resident thereof. In my opinion, it is not a requirement that such enlistments or re-enlistments in the Army, Navy or Marine Corps of the United States shall take place within the Commonwealth. It is only essential that the applicant, at the time of such enlistment, shall be a legal resident of the Commonwealth.

The determination of the question as to whether a given person is a legal resident of the Commonwealth may often be a matter of some difficulty, particularly in the case of re-enlistment of a man who has been for some time in the Federal service. If such a man originally enlisted from Massachusetts, was then legally domiciled here, and his immediate family or next of kin were then, and still are, domiciled here, it would seem that he had retained his legal residence in the Commonwealth. If, at the time of his original enlistment, he or his next of kin were domiciled elsewhere, but the latter have since acquired a legal residence here, and the applicant has in good faith treated this change of residence on the part of his family as a change of his own residence, it would seem that it might well be said in such a case that he had acquired a legal residence here and was entitled to State pay under the provisions of chapter 332 in case of subsequent re-enlistment. Of course, the reverse of that proposition would also be true, namely, that a change of domicile from Massachusetts to another State by the family of a man who had originally enlisted from Massachusetts should ordinarily be taken as meaning that he, too, has changed his residence to the other State. These various questions of legal residence, however, are all matters of fact which must be determined in the particular cases as they arise.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Street Railways — Power of Company to sell its Railway.

The sale by a street railway company of its electric cars to another street railway company, and of its trolley lines, poles, fixtures and land to a third company, is illegal and in violation of St. 1906, c. 463, pt. III, § 51.

June 6, 1917.

Public Service Commission.

Gentlemen: — You have communicated to me certain facts with reference to a particular street railway company, stating that it had sold its electric cars to another street railway company, from which company it now leases them, and had sold its trolley lines, poles, fixtures and land to another corporation. I infer from your letter that you desire an opinion as to the legality of such transfers.

Apparently, this is governed at present by the provisions of St. 1906, c. 463, pt. III, § 51, which is as follows: —

> A street railway company shall not lease or contract for the operation of its railway for a period of more than ninety-nine years without the consent of the general court, nor, except as provided in the three following sections, shall it sell its railway unless authorized so to do by its charter or by special act of the general court.

I understand that no authorization under the three sections following section 51 has been obtained, and that neither the charter nor any special act of the General Court authorizes the transfers mentioned.

So far as this section deals with a sale, it was first enacted by St. 1864, c. 229, § 24, which was as follows: —

> No street railway corporation shall sell or lease its road or property unless authorized so to do by its charter, or by special act of the legislature. . . .

In 1871 this section was amended by omitting the words "or property." As so changed, the section in substance has remained until the present time, except for the substitution of the word "railway" for "road" in the statute of 1906.

In the case of *Richardson* v. *Sibley*, 11 Allen, 65 (1865), the Supreme Court decided that this section prevented a general mortgage of all the property, real and personal, of a street railway corporation. The court said, at page 70: —

But any alienation, either in fee, or for the period of its corporate existence, or for any less term, of substantially all its real and personal property, so as to disable it from carrying on the business which it had been chartered to do for the benefit of the public, is clearly within the terms and the meaning of this prohibition.

In this opinion the court laid some stress upon the fact that the prohibition extended to a sale or lease of the "property" as well as the "road" of the street railway corporation, and pointed out that this should not be construed to prevent the disposal of unimportant portions of the property of the corporation, as "a few horses or cars, or worn out rails, or other articles the sale or transfer of which would not impair its powers to carry on its business."

Despite the fact that since 1871 the word "property" has not appeared in the statute, the decisions of the Supreme Court seem to imply that the rule as laid down in *Richardson* v. *Sibley* is still law.

In *Clemons Electrical Manfg. Co.* v. *Walton*, 206 Mass. 215, the court says: —

But a transfer of the property necessary to enable a railway to perform its duties as a public carrier is as much forbidden by Pub. Sts. c. 113, § 56 (now St. 1906, c. 463, pt. III, § 51), as a transfer of its franchise. That was pointed out in the original case of *Richardson* v. *Sibley*, 11 Allen, 65, 70, and reaffirmed and decided in *Clemons Electrical Manuf. Co.* v. *Walton*, 173 Mass. 286.

In *French* v. *Jones*, 191 Mass. 522, the court also said: —

Our earliest statute upon this subject provided that "no street railway corporation shall sell or lease its road or property unless authorized so to do by its charter, or by special act of the Legislature." St. 1864, c. 229, § 24. And "any alienation, either in fee, or for the period of its corporate existence, or for any less term, of substantially all its real and personal property, so as to disable it from carrying on the business which it had been chartered to do for the benefit of the public, is clearly within the terms and meaning of this prohibition." Gray, J., in *Richardson* v. *Sibley, ubi supra.* And subject to certain limitations not material to the decision of this case, the same prohibition has since remained in force (Pub. Sts. c. 113, § 56; St. 1897, c. 269; R. L. c. 112, §§ 85 *et seq.*), except that in 1900 power was given to the receiver of a street railway company to make such a sale of its road, property, locations and franchises as is here in question.

Apart from this statutory prohibition there are cases holding that transfers of the corporate franchise or of the entire property of public service corporations without express authorization of the Legislature are *ultra vires*, because of the fact that thereby the public service corporation disables itself from the performance of the duties for which it was incorporated. See *Davis* v. *Old Colony R.R. Co.*, 131 Mass. 258, and cases cited; *Braslin* v. *Somerville Horse R.R. Co.*, 145 Mass. 64.

Accordingly, I am of the opinion that these transfers by the street railway company first referred to, taken together, inasmuch as they include practically all of the property of that corporation, and thereby disable it from the performance of its public duties, are illegal and beyond the powers of that corporation effectually to complete.

Apparently, action by your Commission in such a situation is still governed by the provisions of St. 1906, c. 463, pt. I, § 8, which is as follows: —

> If, in the judgment of the board, a railroad corporation or street railway company has violated a law, or neglects in any respect to comply with the terms of the act by which it was created or with the provisions of any law of this commonwealth, it shall give notice thereof in writing to such corporation or company; and thereafter, if such violation or neglect continues, shall forthwith present the facts to the attorney-general for his action.

It would seem that notice under this section should be given to the two corporations mentioned as grantees, inasmuch as they are participating in the illegal transaction.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Intoxicating Liquors — Delivery by Railroad.

Under R. L., c. 100, § 49, as amended by St. 1912, c. 201, a railroad company may lawfully deliver at its railroad station intoxicating liquors to the actual person shown upon the package as the purchaser or consignee.

JUNE 6, 1917.

Public Service Commission.

GENTLEMEN: — In consequence of a complaint relative to the practices of the New York, New Haven & Hartford Rail-

road Company in connection with the delivery of shipments of intoxicating liquors in no-license towns, you have requested my opinion upon the following question: —

Do the provisions of R. L., c. 100, § 49, as amended by St. 1912, c. 201, providing that packages of liquors shipped to no-license towns be plainly marked with the name and address, by street and number if there be such, of the consignee, and that delivery to a person other than the owner or consignee, "or at any other place than is thereon marked," shall be deemed a sale, constitute a requirement to deliver only at the residence or place of business of the consignee, the address to be shown on the package by some form of description, using the street and number, if any, and by implication forbid the delivery of such a shipment to the consignee at the freight station of the railroad company?

R. L., c. 100, § 49, as amended, is as follows: —

Spirituous or intoxicating liquor which is to be transported for hire or reward for delivery in a city or town in which licenses of the first five classes are not granted, shall be delivered by the seller or consignor to a railroad corporation or steamboat corporation operating a regular line of steamships to Martha's Vineyard or Nantucket, or to a person or corporation regularly and lawfully conducting a general express business, and to no other person or corporation, in vessels or packages plainly and legibly marked in a conspicuous place on the outside with the name and address, by street and number, if there be such, of the seller or consignor, and of the purchaser or consignee, and also plainly and legibly marked on the same place or label as the addresses aforesaid, with the kind and amount of liquor therein contained. No person or corporation not regularly and lawfully conducting a general express business, except a railroad corporation or steamboat corporation operating a regular line of steamships to Martha's Vineyard or Nantucket, or a street railway corporation authorized to carry freight or express, shall receive such liquors for transportation for hire or reward for delivery in a city or town, in which licenses of the first five classes are not granted, nor transport or deliver such liquors in such cities or towns. Delivery of such liquors or any part thereof by a railroad corporation, or steamboat corporation or by a person or corporation regularly and lawfully conducting a general express business to a person, other than the owner or consignee, whose name is marked by the seller or consignor on said vessels or packages, or at any other place than is thereon marked, shall be deemed to be a sale by any person making such delivery to such person in the place in which such delivery is made.

It is the interpretation of the last sentence of this section

which raises the question involved. The language here used is substantially the same as that found in the original enactment upon this subject, St. 1897, c. 271.

Section 1 of that statute is as follows: —

All spirituous or intoxicating liquors to be transported for delivery to or in a city or town where licenses of the first five classes have not been granted, when to be transported for hire or reward, shall be delivered by the seller or consignor to a railroad corporation or to a person or corporation regularly and lawfully conducting a general express business, in vessels or packages plainly and legibly marked on the outside with the name and address, by street and number, if there be such, of the seller or consignor, and of the purchaser or consignee, and with the kind and amount of liquor therein contained. Delivery of such liquors or any part thereof, either by a railroad corporation or by a person or corporation regularly and lawfully conducting a general express business, or by any other person, to any person other than the owner or consignee whose name is marked by the seller or consignor on said vessels or packages, or at any other place than thereon marked, shall be deemed to be a sale by any person making such delivery to such person in the place where such delivery is made.

Section 2 required "every railroad corporation" or person conducting a general express business, receiving such liquors, "or actually delivering intoxicating liquors to any person or place in a city or town described in section one of this act," to keep a book showing the date of receipt, a correct transcript of the marks required, date of delivery and name of person to whom delivered, the latter signed by the person receiving.

Read with strict literal accuracy, this last sentence of section 1 makes delivery either to any person other than the owner or consignee or at any place other than that marked on the package a sale by the person making such delivery to the person in the place where delivery is made.

However, I am unable to believe that the Legislature intended that this act should be so construed. It would seem more reasonable to interpret the sentence to read, "delivery other than to the owner or consignee or at the place thereon marked shall be deemed to be a sale."

It is a matter of common knowledge that railroad corporations in this Commonwealth do not deliver freight from house to house or other than at their freight houses or established delivery points. This fact was recognized by the Supreme

Court in the case of *Commonwealth* v. *Mixer*, 207 Mass. 141, 147, *per* Rugg, J.: —

> Moreover, railroads and street railways, common carriers which do not deliver merchandise to houses or places of business, are exempted from the operation of the statute (St. 1906, c. 421).

It is plain from an examination of St. 1897, c. 271, that it was not intended thereby to prohibit the transportation and delivery of intoxicating liquors in no-license cities or towns by railroad corporations. The first sentence of the section requires that sellers deliver the liquors "to a railroad corporation or to a person or corporation regularly and lawfully conducting a general express business." Obviously, if intoxicating liquors transported by a railroad corporation cannot lawfully come into possession of the consignee, the inclusion of the railroad corporation in the classes of persons to whom the seller might deliver liquors for transportation is an absurdity.

It may be suggested that under this 1897 statute a railroad corporation might transport liquors to its freight station and there turn them over to a person or corporation conducting a general express business, as a connecting carrier, and therefore the reasoning above is inconclusive; but it would seem that such delivery by the railroad corporation is as much within the literal prohibitions of this section as that involved in the present question, and it is also doubtful whether the carting of freight or packages from a freight station to a house in the same town is the transaction of an express business. See *Commonwealth* v. *Peoples Express Co.*, 201 Mass. 564, 579.

It is only "liquors to be transported *for delivery*" to which this statute applies. Wherever "delivery" is used in this act it seems to refer to the ultimate delivery to the consignee, and it is for that purpose that the seller is to turn over the liquors either to a railroad corporation or to a person or corporation regularly and lawfully conducting a general express business.

It would seem that the clauses of this last sentence were used distributively, — delivery to the person addressed, applying primarily to the class of carriers first mentioned, to wit, railroads; and delivery at the place designated, applying primarily to those mentioned next, to wit, the express companies. Such application of the words would be in accordance

with the well-known practice of each class as to manner of delivery.

Section 2 of the 1897 act, as shown by the quotation therefrom, expressly recognizes that railroad corporations may lawfully perform this service, and further indicates quite clearly that it was not intended to require delivery to the person at the place marked on the package by the seller, but only to compel delivery either to the person or at the place shown.

The language is, "Every railroad corporation or person . . . conducting a general express business, receiving . . . liquors for delivery, or actually delivering intoxicating liquors *to any person or place* in a city or town described in section one."

In my opinion, this prohibition of the statute is not violated where delivery is made to the consignee in person or at the place marked upon the package as the address of the purchaser or consignee.

Apparently, this was the substance of the charge of the presiding justice in the case of *Commonwealth* v. *Cronan*, 220 Mass. 467. The language of the Supreme Court is as follows: —

> The presiding judge in his instructions to the jury carefully and repeatedly stated that the charge against the defendant was keeping intoxicating liquors with intent to sell the same, and after referring to St. 1912, c. 201, and reading it to the jury, pointed out that before a delivery of intoxicating liquors could be deemed to be a sale the delivery must be of such liquors as are referred to in the statutes, and by a person doing a general express business, and that the liquors must have been delivered either to a person other than the owner or consignee whose name is marked on the vessel or package, or to some other place than is marked thereon.

I am aware that there is some language in the opinion in the case of *Rea* v. *Aldermen of Everett*, 217 Mass. 427, 429, which, taken strictly, would imply an opposite construction, but it seems that the court was not dealing expressly with this point, and, in my opinion, did not intend to pass upon the question here involved.

It has several times been said that —

> The act was manifestly intended to meet some difficulties which had been encountered by the government in the prosecution of common carriers for illegal keeping of intoxicating liquors, and to make it more

difficult for the guilty to escape detection when setting up the fraudulent defence that the liquors found in the possession of the carrier were for delivery by him as such to some person. *Commonwealth* v. *Intoxicating Liquors*, 172 Mass. 311, 315.

Obviously, the interpretation outlined above in no way violates the purpose of the act as here defined, and the tracing of the liquors from the seller to the real purchaser is as complete where delivery is made to the party in person, designated as the purchaser, as where made at the address specified.

Assuming that this is the correct interpretation of the act as passed in 1897, the later amendments to the particular section have not changed its effect in this respect. Other acts upon the same subject which have since been enacted can give little light as to the intention of an earlier Legislature, and none of them seem at all inconsistent with this construction.

Accordingly, though with some hesitation, I have come to the opinion that delivery by a railroad corporation at its freight station to the actual person shown upon the package as the purchaser or consignee of the intoxicating liquors is not illegal by virtue of the provisions of R. L., c. 100, § 49, as amended by St. 1912, c. 201.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Motor Vehicles used by the Federal or the State Government for Military Purposes — Registration of — Licensing of Operators of.

Motor vehicles which are loaned to the Federal or the State government for military purposes are not required to be registered, nor the operators thereof to be licensed, while such vehicles are actually being used for military purposes and operated by persons in the military service of the Federal or State government in the performance of their duty.

JUNE 19, 1917.

Massachusetts Highway Commission.

GENTLEMEN: — I am in receipt of your letter requesting my opinion upon the question of "whether motor vehicles which are in the control of, but not owned by, the United States or the Commonwealth must be registered, notwithstanding the fact that they are to be used solely for military service; and whether the operators of such vehicles must be licensed."

Under date of April 24, 1917, I advised your Commission that motor vehicles owned by the United States or by the Commonwealth are not required by the laws of this Commonwealth to be registered while being used for military purposes, nor the operators thereof to be licensed.

In my opinion, the same answer must be given with reference to cases where motor vehicles are loaned to the Federal or the State government for military purposes, the title remaining in the individual owners, namely, that while such vehicles are actually being used for military purposes and operated by persons in the military service of the Federal or the State government in the performance of their duty, they are not required to be registered, nor such operators to be licensed.

Very truly yours,
HENRY C. ATTWILL, *Attorney-General.*

Employees of Commonwealth — Compensation of — Temporary Increase — Watchmen at State Prison.

Watchmen at the State Prison who have received an increase in salary under R. L., c. 223, § 19, as last amended by St. 1914, c. 554, since July 1, 1916, are not entitled to receive the additional compensation provided by St. 1917, c. 323, unless they choose to waive such increase; nor will any of such watchmen be entitled to any increase in pay hereafter under R. L., c. 223, § 19, as amended by St. 1914, c. 554, while they continue to receive additional compensation under Gen. St. 1917, c. 323.

JUNE 19, 1917.

Mr. NATHAN D. ALLEN, *Warden, State Prison.*

DEAR SIR: — I am in receipt of your letter requesting my opinion upon whether any or all of the watchmen in the State Prison are entitled to the temporary increases of salary provided for by Gen. St. 1917, c. 323.

Sections 1 and 2 of said chapter provide for a temporary increase in salary of 20 per cent., but not to exceed $100 per year, for all persons who have been regularly in the employ of the Commonwealth from the first day of July, 1916, based upon the salary received on that date. Section 4 of this act is as follows: —

This act shall not be construed as in any way repealing or abridging any act providing for the increase of compensation of any employees of the commonwealth, including employees whose salaries, under exist-

ing provisions of law, are made to increase automatically, by graduated instalments, from year to year, until the maximum therein provided has been reached, but employees who accept additional compensation under the provisions of this act shall not, during such time as they shall continue to receive the additional compensation herein provided for, be entitled to the benefit of any increase in compensation which they may have received since the first day of July in the year nineteen hundred and sixteen, or to which they may hereafter become entitled. But any such employee may at any time elect to receive any increase in compensation to which he might otherwise be entitled in lieu of the additional compensation hereby provided for.

R. L., c. 223, § 19, as last amended by St. 1914, c. 554, provides that watchmen in the State Prison who have been in said service for less than one year shall receive an annual salary of $800; watchmen who have been in said service for more than one year and less than three years shall receive an annual salary of $1,000; watchmen who have been in said service for three years and less than five years shall receive an annual salary of $1,200; and watchmen who have been in said service for five or more years shall receive an annual salary of $1,400.

In my opinion, any of the watchmen at the State Prison who have received an increase in salary since the first day of July, 1916, are not entitled to the benefit of the additional compensation provided for by Gen. St. 1917, c. 323, unless, of course, they choose to waive such increase; nor will any of the watchmen be entitled to any increase in pay hereafter under the provisions of St. 1914, c. 554, while they continue to receive the additional compensation provided for by the act of 1917. For example, a watchman who had been in said service more than five years on July 1, 1916, and who was, therefore, receiving a salary of $1,400 a year, would be entitled to an increase of $100; but a watchman who had completed his five-year term of service since July 1, 1916, and whose salary, therefore, was increased from $1,200 to $1,400 since that date, would not, as a practical matter, be entitled to receive the additional compensation provided for by the act of the present year, since, in order to be entitled thereto, it would be necessary for him to waive the increase in salary of $200, which, obviously, he would not elect to do.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Employees of Commonwealth — Compensation of — Temporary Increase.

The temporary increase in the compensation of certain employees of the Commonwealth, provided for by Gen. St. 1917, c. 323, is to be apportioned to each of the monthly payments of salary, and is not to be paid in a lump sum.

The maximum increase in salary of an employee coming within Gen. St. 1917, c. 323, § 3, is one-half of the maximum increase of $100 provided for by section 2 of that act.

An employee of the Commonwealth who comes within the provisions of St. 1914, c. 605, by accepting the temporary increase provided by Gen. St. 1917, c. 323, waives the benefit of any increase in salary received under said chapter 605 after July 1, 1916, so long as such employee continues to receive the temporary increase under said chapter 323. But upon the relinquishment by such employee of the temporary increase, he becomes entitled to the increase in compensation to which he would otherwise be entitled under St. 1914, c. 605.

June 20, 1917.

Hon. Alonzo B. Cook, *Auditor of the Commonwealth.*

Dear Sir: — You have requested my opinion as to certain questions which have arisen as to the proper interpretation of Gen. St. 1917, c. 323, entitled "An Act to authorize temporary increase in the compensation of certain employees of the Commonwealth."

In my opinion, the increase in compensation provided for by section 2 of that statute is to be regarded as an addition to the regular salary of the employees entitled to it. Thus, it is to be apportioned to each of the monthly payments of salary, and is not to be paid in a lump sum.

Section 3 provides, in part, as follows: —

> All persons included in the provisions of section one who are receiving from the commonwealth as part of their compensation maintenance in full or in part, provided that the amount of compensation which they receive in full for all services in addition to such maintenance does not exceed twelve hundred dollars a year, shall, for the period specified in said section, receive as additional compensation a sum equal to one half the additional compensation provided for by section two. . . .

In my opinion, the maximum increase of an employee coming within the terms of this section is to be one-half of the maximum increase of $100 provided for by section 2. It is, therefore, to be $50.

Section 4 is as follows: —

This act shall not be construed as in any way repealing or abridging any act providing for the increase of compensation of any employees of the commonwealth, including employees whose salaries, under existing provisions of law, are made to increase automatically, by graduated installments, from year to year, until the maximum therein provided has been reached, but employees who accept additional compensation under the provisions of this act shall not, during such time as they shall continue to receive the additional compensation herein provided for, be entitled to the benefit of any increase in compensation which they may have received since the first day of July in the year nineteen hundred and sixteen, or to which they may hereafter become entitled. But any such employee may at any time elect to receive any increase in compensation to which he might otherwise be entitled in lieu of the additional compensation hereby provided for.

It is my opinion that under the provisions of this section any employee receiving compensation under St. 1914, c. 605, who accepts the temporary increase provided by chapter 323, is required thereafter to waive the benefit of any increases of salary received under the provisions of chapter 605 after July 1, 1916, so long as such person continues to receive such temporary increase. In my opinion, however, the last sentence of section 4 of said chapter 323 must be interpreted as authorizing any employee who comes within the provisions of St. 1914, c. 605, and has accepted the temporary increase, to relinquish that increase and to receive the compensation to which he would at that time be entitled under chapter 605 if he had not accepted the temporary increase. Any other interpretation of this last-mentioned provision would result in penalizing an employee for accepting the temporary increase.

It is to be noted, however, that increases under the provisions of St. 1914, c. 605, are not strictly automatic. By section 4 of said chapter 605 they are made dependent upon a certificate by the head of the department to the Auditor that the conduct of the clerk or stenographer has been in all respects satisfactory and that he or she is entitled to the increase. It is not entirely clear that the head of a department is authorized to issue such certificates for more than one annual increase of $50 at one time. Accordingly, if the head of a department desires that an employee coming within the provisions of this statute should continue to have the benefit of the annual increases provided by it, he should annually certify

under the provisions of section 4 of said chapter 605 that such employee is entitled to this increase, even though in fact the employee is not accepting the increase but is claiming the temporary compensation provided by Gen. St. 1917, c. 323. Such a course is desirable in order that when the employee desires to give up the temporary increase and return to the system of compensation provided by St. 1914, c. 605, there may be no question as to his status under that statute at that time.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

War Service — State Pay — Aviation Corps — Medical Department.

Persons having a residence of at least six months within the Commonwealth, who, subsequent to Feb. 3, 1917, have enlisted in the aviation section of the signal corps of the United States Army or in the medical department of the army, whether as members of the regular force or of the enlisted reserve corps, and who have been called into active service and assigned to that department, are eligible to the State pay provided by Gen. St. 1917, cc. 211 and 332.

JUNE 22, 1917.

Hon. CHARLES L. BURRILL, *Treasurer and Receiver-General.*

DEAR SIR: — You request my opinion as to whether citizens of Massachusetts who enlist in the aviation corps or in base hospital units are entitled to receive payments under Gen. St. 1917, cc. 211 and 332.

As I understand it, neither of the units to which you refer is connected with the National Guard of the Commonwealth, and therefore these men do not form a part of the quota of the Commonwealth, within the meaning of chapter 211. In order to bring them within the additional rights created by chapter 332, it must appear that the units with which they are connected are a part of the regular or volunteer forces of the United States Army, Navy or Marine Corps as recognized by the Federal statutes.

The Act of Congress approved June 3, 1916, regulating the organization of the army of the United States, provides, in section 13, for an aviation section of the signal corps. Connected with this section are certain enlisted men, including non-commissioned officers. These men, in my opinion, if otherwise entitled, come within the provisions of chapter 332.

Section 10 of the Federal statute to which I have referred provides for the organization of the medical department of the Regular Army, and establishes a certain enlisted force. In my opinion, the members of this force, if otherwise entitled, come within the provisions of chapter 332.

This Federal statute also provides for the enlisted reserve corps as one of the sections of the army of the United States. This corps is established, as provided in section 55, "for the purpose of securing an additional reserve of enlisted men for military service with the Engineer, Signal, Quartermaster Corps, Ordnance and Medical Departments, of the Regular Army." The men enlisted in this corps, when called into active service, have all the authority, rights and privileges of men of like grades in the Regular Army; they wear the same uniform, perform the same duties, and receive the same pay as such grades. The President is authorized to assign them "as reserves to particular organizations of the Regular Army." In my opinion, the members of this enlisted reserve corps, when called into active service and duly assigned to the medical department of the Regular Army, or to any other particular organization of that army, if otherwise entitled, come within the provisions of chapter 332. Thus, citizens serving in the base hospital units to which you refer, if members of the enlisted force of the medical department of the Regular Army or members of the enlisted reserve corps called into active service and duly assigned to that department, are entitled to receive the payments provided for by Gen. St., cc. 211 and 332.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Appointment to fill an Anticipated Vacancy in Public Office — Validity of.

A valid appointment may be made to fill an office created by a statute after the passage of that statute and before it goes into effect.

JUNE 26, 1917.

His Excellency SAMUEL W. MCCALL, *Governor of the Commonwealth.*

SIR: — You request my opinion in relation to the appointment of the two additional members of the Industrial Accident Board authorized by Gen. St. 1917, c. 297, entitled "An

Act relative to the settlement of claims under the workmen's compensation act." The question submitted is: Has the Governor authority to name the two additional members of the Industrial Accident Board, as authorized by this act, before the date that the act goes into full effect?

R. L., c. 8, § 1, provides: —

> A statute shall take effect throughout the commonwealth, unless otherwise expressly provided therein, on the thirtieth day next after the day on which it is approved by the governor, or is otherwise passed and approved, or has the force of a law, conformably to the constitution.

I think it clear that by reason of this statute the act did not go into full effect until the thirtieth day next after May 24, 1917, the date when it was approved by the Governor.

Mechem's Public Offices and Officers, § 133, lays down the following proposition: —

> A prospective appointment to fill an anticipated vacancy in a public office made by the person or body which, as then constituted, is empowered to fill the vacancy when it arises, is, in the absence of express law forbidding it, a legal appointment and vests title to the office in the appointee.

See also *Whitney* v. *Van Buskirk*, 40 N. J. L. 463.

I have been unable to find any authority to the contrary. It would seem as if the principle laid down in Mechem's Public Offices and Officers would apply in the present instance, although I have been unable to find any case in which this precise question has arisen. The reason for this doctrine is to prevent hiatuses occurring. If the appointment could not be thus made, many instances might occur where there was no official qualified to act under the law during the period required to appoint, and secure the confirmation of the appointment, and the qualification of the official. I think it can be strongly argued that one of the purposes of R. L., c. 8, § 1, is to make provision so that the machinery required by a statute may be prepared, in order that the act may go into full operation upon its taking effect.

Accordingly, I beg to advise you that it is my view that appointments made between May 24, 1917, and the time when the act went into effect are lawful.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Banks and Banking — State Banks — Repeal of Law authorizing Formation of.

R. L., c. 115, authorizing the formation of State banks, was not repealed by St. 1908, c. 590, and acts in amendment thereof, and an incorporation may now be effected under R. L., c. 115.

June 29, 1917.

His Excellency Samuel W. McCall, *Governor of the Commonwealth.*

Sir: — You have requested my opinion as to whether you should proceed under the provisions of R. L., c. 115, § 3, to appoint commissioners to examine and count the money paid in upon the capital stock of a new banking corporation organized under that chapter, which relates to the formation and regulation of State banks. The application in the present instance is made by a proposed corporation having the name "The State Bank."

Although as a practical matter this chapter has been inoperative for many years, it has remained upon the statute books without express repeal and without direct amendment for a long period of time.

The Commissioners for Consolidating and Arranging the Public Statutes in their report annexed to this chapter the following note: —

This chapter is printed without substantial change. It has not been amended since the Public Statutes of 1882, and nearly all its provisions were enacted prior to the General Statutes of 1860. After the passage of Sts. 1863, c. 244, 1864, c. 190, and acts in addition thereto relating to State banks surrendering their charters upon becoming banking associations under the laws of the United States, all the State banks in this Commonwealth surrendered their State charters. For many years no State bank has existed under this chapter, and until there is a change in the United States banking laws no such bank will be established. Many of the provisions of the chapter are antiquated and not adapted to present modes of business, and the chapter requires revision by a legislative committee on banks and banking before being enforced. If the chapter is repealed, some provision may be necessary to authorize the continuance of business in this Commonwealth of foreign banking corporations. See opinion of the Attorney-General March 30, 1899, addressed to the Commissioner of Corporations. See also note, c. 118, § 27.

The implied recommendation of repeal thereby made was not accepted. The Bank Commissioner in his last report to

the Legislature also advised that this chapter be repealed (Pub. Doc. No. 8, p. XV). Such action, however, was not taken.

The doubt as to your duty to make the appointment requested arises by reason of St. 1908, c. 590, § 16, as amended by St. 1909, c. 491, § 4, and by St. 1914, c. 610, which is as follows: —

> No corporation, either domestic or foreign, and no person, partnership or association except savings banks and trust companies incorporated under the laws of this commonwealth, or such foreign banking corporations as were doing business in this commonwealth and were subject to examination or supervision of the commissioner on June first, nineteen hundred and six, shall hereafter make use of any sign at the place where its business is transacted having thereon any name, or other word or words, indicating that such place or office is the place or office of a savings bank. Nor shall such corporation, person, partnership or association make use of or circulate any written or printed or partly written and partly printed paper whatever, having thereon any name, or other word or words, indicating that such business is the business of a savings bank; nor shall any such corporation, person, partnership or association, or any agent of a foreign corporation not having an established place of business in this commonwealth, solicit or receive deposits or transact business in the way or manner of a savings bank, or in such a way or manner as to lead the public to believe, or as in the opinion of the commissioner might lead the public to believe, that its business is that of a savings bank. Nor shall any person, partnership, corporation or association except co-operative banks incorporated under the laws of this commonwealth and corporations described in the first sentence of this section hereafter transact business under any name or title which contains the words "bank" or "banking," as descriptive of said business, or, if he or it does a banking business or makes a business of receiving money on deposit, under any name or title which contains the word "trust," as descriptive of said business.

The last sentence of this section, down to the words "or, if he or it does a banking business or makes a business of receiving money on deposit, under any name or title which contains the word 'trust,' as descriptive of said business," was added by the 1909 amendment, and the words quoted immediately above were added by the amendment of 1914.

While it may be doubted whether the Legislature, in enacting the amendment of 1909, had in mind the possibility of the formation of corporations under R. L., c. 115, the language

used therein is broad enough in its terms to exclude all corporations, other than those expressly excepted, from the transaction of business "under any name or title which contains the word 'bank.'" The fact that in the sweeping language of this amendment there was included an exception of "co-operative banks" would ordinarily raise an implication that co-operative banks would have been included in the general language but for their exception, and, accordingly, that the Legislature intended a prohibition as broad as the language in fact used.

But this rule must not be carried too far. Such clauses are often introduced from excessive caution and for the purpose of preventing a possible misinterpretation of the act by including therein that which was not intended. The rule is, therefore, not one of universal obligation, and must yield to the cardinal rule which requires a court to give effect to the general intent if that can be discovered within the four corners of the act. If such general intention would be defeated by construing the act as embracing everything of the same general description as those particularly excepted therefrom, an arbitrary application of the rule is not admissible.

Per Lurton, C.J., in *Baggaley* v. *Pittsburg & Lake Superior Iron Co.*, 90 Fed. Rep. 636, at p. 638. See also *Arrowsmith* v. *Dickenson*, 20 Q. B. D. 252, 256; *Tinkham* v. *Tapscott*, 17 N. Y. 141.

What indications of the general legislative intent are disclosed by these statutes? Section 16 of St. 1908, c. 590, is entitled "Unauthorized Banking Prohibited." The amendatory act, St. 1909, c. 491, is entitled "An Act relative to savings banks and trust companies," while section 4 thereof, which adds to said section 16 the words which cause the present difficulty, leaves the title of section 16 substantially as before, — "Unauthorized banking prohibited, etc."

These titles expressly show an intent to prohibit "unauthorized" banking rather than to prohibit the transaction of business by special corporations expressly authorized to engage in banking.

R. L., c. 115, § 4, prescribes the name of corporations created under that chapter to be in the following form: "The President, Directors, and Company of the Bank (the name of the bank)."

It is to be observed that the 1909 amendment was passed

apparently as a result of the recommendation of the Bank Commissioner, found on page XXX of his report for the year 1908: —

> Section 16 might well be broadened to prevent the use of the words "bank," "banking" and "trust" in connection with the word "company" by organizations not incorporated under the banking or trust company laws of this Commonwealth.

The bill which ultimately became St. 1909, c. 491, was reported to the Legislature by the committee to which was referred this portion of the report of the Bank Commissioner.

This fact also would raise some doubt as to whether the Legislature intended to enact legislation so much more sweeping in its effect than that recommended by the Bank Commissioner, as would be the case if the statute were interpreted as forbidding the transaction of business by a corporation formed under the provisions of the statutes of the Commonwealth specially designed for the formation of banking corporations, and expressly requiring the use of the word "bank" as a part of the name thereof.

Unless there is implied some exception to the language used in this amendment, the statute, if constitutional, would prohibit the transaction of business by national banking associations doing business under the sanction and authority of Federal laws. In my opinion, the Legislature could not have intended such a result, and the section must be construed as not including such corporations within its prohibitions. Similarly, it seems unlikely that the Legislature intended to affect domestic corporations required by Massachusetts statutes to have the word "bank" as a part of their names.

It is true that State banks would fall within the literal terms of the prohibition, but in cases where it appears that a literal interpretation would lead to results absurd or contrary to the supposed intention of the Legislature, the Supreme Court frequently has interpreted such statutes as subject to an implied exception.

For example, the statute making a mother and grandmother bound to support a pauper was held not to apply to a married woman, but, it was said, "must be read as if the description were 'mother and grandmother not being under coverture.'" *Gleason* v. *Boston*, 144 Mass. 25, 28.

A statute placing a heavier penalty upon larceny "by

stealing *in any building*" than upon ordinary larceny was held not to apply to larceny by the owner of the building or his wife. *Commonwealth* v. *Hartnett*, 3 Gray, 150.

The United States statute limiting the individual liability "of a shipowner" was held not to apply to the owner of a fishing vessel, especially in view of the title to the act. *Simpson* v. *Story*, 145 Mass. 497; see also *Ayers* v. *Knox*, 7 Mass. 309.

In *Inhabitants of Somerset* v. *Inhabitants of Dighton*, 12 Mass. 383, at page 384, it is said: —

> But, in the exposition of statutes such a construction should be given as will best effectuate the intention of the makers. In some cases, the letter of a statute may be restrained by an equitable construction; in others, enlarged; and, in others, the construction may be even contrary to the letter. For a case may be within the letter, and not within the meaning of a statute.

See also, *Staniels* v. *Raymond*, 4 Cush. 314, 316; *Commonwealth* v. *Kimball*, 24 Pick. 366, 370; *Commonwealth* v. *Inhabitants of Dracut*, 8 Gray, 455, 457.

It would seem, then, that the Legislature could not have intended to prohibit the transaction of business under a name which included the word "bank" when the use of such name was expressly authorized by law in a chapter authorizing the creation of State banks, unless it had in mind the repeal of the earlier chapter. That the Legislature intended such a sweeping effect seems to me improbable. In order to reach the conclusion that new corporations cannot now be formed under this chapter, it would be necessary to hold that it had been repealed by implication. Such repeals are not to be favored. *Snell* v. *Bridgewater Cotton Gin Mfg. Co.*, 24 Pick. 296; *Haynes* v. *Jenks*, 2 Pick. 172, 176.

If the Legislature intended to repeal an entire chapter of the Revised Laws it is fair to assume that it would be done by express enactment rather than by implication.

Accordingly, although with some hesitation because of the arguments which can be advanced on either side of the question, I have come to the conclusion that an incorporation may be legally effected under the provisions of R. L., c. 115, and that you are warranted in proceeding to appoint commissioners under section 3 thereof.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Taxation — Failure to bring in List of Taxable Personal Estate — Amount of Assessment — Abatement.

A person who fails to bring in a list of his taxable personal estate, as required by sections 41 to 49, inclusive, of St. 1909, c. 490, pt. I, must in the first instance be assessed by local assessors for an amount of personal estate not less than that for which he was assessed in 1916, and then he has all the remedies for abatement provided by sections 72 to 84 of that statute, subject to any conditions and penalties therein contained.

July 9, 1917.

Hon. William D. T. Trefry, *Tax Commissioner.*

Dear Sir: — You request my opinion as to whether the provisions of the statutes with reference to the abatement of taxes assessed upon personal property apply to assessments made under the provisions of Gen. St. 1916, c. 269, § 22.

That section provides, in part, as follows: —

> Any taxpayer who in the year nineteen hundred and seventeen fails to bring in a list of taxable personal estate, as provided in sections forty-one to forty-nine, inclusive, of Part I of chapter four hundred and ninety of the acts of the year nineteen hundred and nine, and acts in amendment thereof and in addition thereto, shall be assessed in that year for an amount of personal estate not less than that for which he was assessed and taxed in the year nineteen hundred and sixteen.

This section makes no reference whatever to abatement proceedings.

St. 1909, c. 490, pt. I, § 73, provides, in part, as follows: —

> A person shall not have an abatement, except as otherwise provided, unless he has brought in to the assessors the list of his estate as required by section forty-one. . . . If such list is not filed within the time specified in the notice required by section forty-one, no part of the tax assessed upon the personal estate shall be abated unless the applicant shows to the assessors a reasonable excuse for the delay or unless such tax exceeds by more than fifty per cent the amount which would have been assessed upon such estate if the list had been seasonably brought in, and in such case only the excess over such fifty per cent shall be abated. . . .

You refer to section 22 of the income tax law as a penalty section. I cannot agree that it should be so construed. It does not purport to impose a penalty upon a taxpayer who fails to bring in a list, in addition to that imposed by section

73. It is applicable only in the year 1917, and it is most unusual to establish a penalty for one year only.

In my opinion, section 22 of the income tax law should be construed merely as a direction to the assessors as to the manner in which in the year 1917 they should perform the duty imposed upon them by St. 1909, c. 490, pt. I, § 47, which provides that "they shall ascertain as nearly as possible the particulars of the personal estate . . . of any person, firm or corporation which has not brought in such list, and shall estimate its just value, according to their best information and belief." As a result of the income tax law, hereafter local assessors are to assess only tangible personal property. Their previous assessments of personal property did not ordinarily give any indication of the value of the tangible personal property owned by the various taxpayers. It was necessary for the proper administration of the new law that there should be some definite starting point fixed in the assessment of local taxes for the first year of the operation of the new law. The Legislature, by enacting section 22, chose to fix as that starting point for all cases where no return of taxable personal property was filed the assessed valuation of the personal property for the preceding year, and, accordingly, by this section the assessors were directed to make their assessments for 1917 upon this basis. The fact that the only penalty referred to in this section is one to be imposed upon assessors who do not carry out its provisions, plainly indicates that the section is to be construed solely as a direction to the assessors, and not as imposing a penalty upon taxpayers in one year only.

The result is that, in my opinion, a person who fails to bring in a list of his taxable personal estate, as provided in sections 41 to 49, inclusive, of part I of the tax act, must in the first instance be assessed by local assessors for an amount of personal estate not less than that for which he was assessed and taxed in 1916, and that he then has all the remedies for abatement provided by sections 72 to 84 of part I of the tax act, subject, of course, to any conditions and penalties therein contained.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Settlement — Illegitimate Children — Inmates of Boston State Hospital or Massachusetts School for the Feeble-Minded.

An illegitimate child whose mother died prior to the passage of St. 1911, c. 669, retains the settlement, if any, which it had under the law as it previously stood.

St. 1911, c. 669, § 2, applies to persons admitted to the Psychopathic Department of the Boston State Hospital or the school department of the Massachusetts School for the Feeble-Minded.

July 9, 1917.

Mr. Robert W. Kelso, *Secretary, State Board of Charity.*

Dear Sir: — You have requested my opinion upon certain questions arising under St. 1911, c. 669, as follows: —

1. Can an illegitimate child, who was a minor when this law was passed, follow and have the settlement of the mother, in accordance with the provisions of the fourth paragraph of section 1, if the mother dies prior to the passage of the act?

The clause referred to is as follows: —

Fourth, Illegitimate children shall follow and have the settlement of their mother if she has any within the commonwealth.

The law as it previously stood provided (R. L., c. 80, § 1, cl. 3d): —

Illegitimate children shall have the settlement of their mother at the time of their birth, if she then has any within the commonwealth.

It is a general presumption in the construction of statutes that their operation is to be prospective unless the contrary appears. *Commonwealth* v. *Sudbury*, 106 Mass. 268.

While the Legislature has the power arbitrarily to create a settlement or transfer it from one municipality to another, the intention to cause such a result must clearly appear if it is to be effected.

I do not find any language in this statute which would seem to rebut the general presumption that it is prospective in its operation.

Under the facts stated the mother of the child died prior to the enactment; consequently, it cannot strictly be said that at the date of its passage "she has any" settlement within the Commonwealth.

Accordingly, I am of the opinion that an illegitimate child whose mother died prior to the passage of St. 1911, c. 669, retains the settlement, if any, which it had under the law as it previously stood.

2. Does section 2 apply to persons admitted to the Psychopathic Department of the Boston State Hospital or to the school department of the Massachusetts School for the Feeble-Minded?

Section 2 is as follows: —

No person shall acquire a settlement, or be in process of acquiring a settlement, while receiving relief as a pauper, unless, within two years after the time of receiving such relief, he tenders reimbursement of the cost thereof to the commonwealth, or to the city or town furnishing the same.

This is but a slight modification of the law as laid down by the court prior to the original passage of this statute in 1874 (*Charlestown* v. *Groveland*, 15 Gray, 15), the general principle being that persons supported at public expense are not capable of acquiring a settlement.

As to the Psychopathic Department of the Boston State Hospital, I am not aware of any statute which puts it in any different class from the other hospitals for the insane. Persons cared for therein are supported at the expense of the Commonwealth.

As to the school department of the Massachusetts School for the Feeble-Minded there may originally have been some distinction. In its inception this institution was a corporation supported by private charity. Gradually, however, control has been taken over by the State, so that it appears from the sixty-ninth annual report of the trustees that all of the regular maintenance expenses are borne by the State. Apparently, by Gen. St. 1917, c. 223, the right of the trustees previously existing to admit pupils gratuitously is practically abolished, while by chapter 133 of the General Acts of the same year provision is made for collection of charges for the support of all inmates in the same manner as provided for inmates of other institutions under the supervision of the Commission on Mental Diseases.

Accordingly, at the present time it seems that all inmates, charges for whose support are not paid by themselves or their

friends or relatives, are in fact supported at public expense as truly as are any other persons who are prevented from acquiring a settlement thereby.

I am of the opinion, therefore, that section 2 of St. 1911, c. 669, does apply to persons admitted to the Psychopathic Department of the Boston State Hospital or to the school department of the Massachusetts School for the Feeble-Minded.

3. How does section 4 affect the legal settlement of a person absent from his place of settlement for five years, exclusive of the time he was in the almshouse of said place, he at the time of admission to the almshouse being a resident of another city or town and immediately after discharge returning thereto?

Section 4 is as follows: —

A person who, after the passage of this act, is absent for five consecutive years from the city or town in which he had a settlement shall thereby lose his settlement. But the time during which a person shall have been an inmate of any public hospital, public sanatorium, almshouse, jail, prison, or other public institution, within the commonwealth, or of a soldiers' or sailors' home whether within or without the commonwealth, shall not be counted in computing the time either for acquiring or for losing a settlement, except as provided in section two.

Under this section the absence from the city or town of settlement which will operate to defeat the settlement must be "for five consecutive years." If a person is in the almshouse located in the place of his settlement, it cannot be said that he is absent from that city or town.

Accordingly, in my opinion, the fact that he was absent from his place of settlement for a period of time less than five years prior to his admission to the almshouse in his place of settlement is not to be taken into account in applying the provisions of section 4 of this act, and such a person will not lose his settlement by departing from that place after his discharge from its almshouse until he has been absent for five years consecutively thereafter.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Commonwealth — Commission for the Blind — Laws relating to Hawkers and Pedlers not Applicable to Sales by.

R. L., c. 65, and amendatory acts, relating to itinerant vendors and hawkers and pedlers, do not apply to sales conducted by the Massachusetts Commission for the Blind for disposing of home and shop products of blind labor.

July 13, 1917.

Mr. James P. Munroe, *Chairman, Commission for the Blind.*

Dear Sir: — You request my opinion as to whether the provisions of R. L., c. 65, and its amendments, relating to the regulation of sales by itinerant vendors and by hawkers and pedlers, apply to sales conducted by your Board for disposing of home and shop products of blind labor.

As I understand it, these sales are made by persons employed by your Board and paid out of the appropriation made for your work. I also understand that the goods sold are either the property of the Commonwealth which have been made by blind labor paid by the Commonwealth, from material furnished by it, or else that they are goods made by blind persons from their own materials on their own account and consigned to your Board for sale. In the latter case the goods are sold by you as agents of the consignors and no commission is charged. On these facts it is apparent that these sales are either sales conducted by the Commonwealth of its own property, or sales conducted by it as agent, in both instances as a part of its work of educating, assisting and maintaining blind persons.

It is well settled that police regulations are not to be construed as applying to the Commonwealth unless it clearly appears that it was intended that they should so apply. *Teasdale* v. *Newell, etc., Construction Co.*, 192 Mass. 440; II Op. Atty.-Gen. 400.

The statute under consideration is plainly a police regulation, and must be construed with reference to this rule. I am unable to find in it or in any of its amendments the slightest indication that it was intended by the General Court to apply to activities of the Commonwealth. Accordingly, in my opinion, it must be interpreted as not applying to the activities of your Board, and, therefore, your agents in carrying on the work of your Board are not required to be licensed

either as itinerant vendors or as hawkers and pedlers, even though the methods employed by them would otherwise bring them within the terms of the statute.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Retirement Association — Assessment upon Members in Military or Naval Service.

The assessments to be made upon members of the Retirement Association who have been mustered into the military or naval service of the United States, and who are receiving from the Commonwealth the payments provided by Gen. St. 1917, c. 301, should be in the same amount as before the members were mustered into the Federal service.

JULY 13, 1917.

Board of Retirement.

GENTLEMEN: — You have requested my opinion as to the basis upon which assessments are to be made upon members of the Retirement Association who have been mustered into the military or naval service of the United States and are receiving payments under the provisions of Gen. St. 1917, c. 301.

Section 1 of that statute is as follows: —

There shall be allowed and paid, out of the treasury of the commonwealth, to every employee of the commonwealth who has been or is hereafter mustered into the military or naval service of the United States during the present war, an amount equal to the difference between the compensation received by him from the United States, plus the compensation received as extra military pay, received from the commonwealth, and the amount which he was receiving from the commonwealth at the time when he was mustered in. The said payments shall continue so long as he continues in the military or naval service of the United States, but shall cease one month after the termination of the war. In case of his death in the said service his widow, minor children, parents or dependents shall receive the said sum until the termination of the war.

R. L., c. 19, § 25, provides as follows: —

Any person in the classified public service of the commonwealth or of any city or town thereof who resigns such office or leaves such service for the purpose of enlisting and serving in the army or navy of the

United States or in the militia of this commonwealth in time of war and so enlists and serves, may at any time within one year after his honorable discharge from such military or naval service be appointed to or employed in his former or a similar position or employment, without application or examination.

Though the first-mentioned statute does not expressly provide that an employee is to be taken back into the service of the Commonwealth at the termination of the war or of his military or naval service, yet the last-mentioned provision seems plainly to authorize such action, at least in the case of employees in the classified civil service. The implication is that the person performing the work of the absent employee is doing so only temporarily, and that the absent employee may be reinstated upon his return.

Reading these two sections together, in the light of their apparent purpose, it seems to me that, at least for the purposes of the administration of the retirement system, Gen. St. 1917, c. 301, should be interpreted as granting a leave of absence, with pay, during the continuance of the war and for thirty days thereafter, to all employees mustered into the military or naval service of the United States during the present war. The employee is required to credit against his salary merely such compensation as he receives on account of his military services. Thus interpreting the statute, it is my opinion that you should take as a basis for the assessments upon members of the Retirement Association their full salary as it was paid them when their leaves of absence under this statute began, without considering the deductions made on account of their military or naval pay. The result is that their assessments are of the same amount as they were before the members entered the service of the United States.

If cases arise where employees of the Commonwealth receive more compensation on account of their military or naval services than they had been receiving from the Commonwealth, and thus they receive no compensation under chapter 301, it is my opinion that, if you are satisfied that they have not resigned their positions but have merely been granted leaves of absence, you are warranted in accepting from them assessments of the same amount which they were paying before they entered the service of the United States.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Commonwealth Flats — Authority of Commission on Waterways and Public Lands to authorize Lessee to keep or sell Gasoline.

The Commission on Waterways and Public Lands may lease portions of the Commonwealth Flats, so called, in South Boston, but cannot authorize the keeping or sale of gasoline by the lessee without the approval of the Fire Prevention Commissioner.

July 26, 1917.

Commission on Waterways and Public Lands.

Gentlemen: — You have requested my opinion as to whether your Commission has authority to "grant a location for a station from which gasoline may be sold on State property in South Boston; and whether, if such a grant may be made, it is subject to the approval of the Fire Prevention Commissioner."

Your Commission undoubtedly has the right to lease portions of the Commonwealth's lands in South Boston, subject to the approval of no persons except, in certain instances, the Governor and Council.

The lessee of such lands, however, is not exempt from the police regulations of the State simply by reason of the fact that he has obtained his title from the Commonwealth. Any lease which might be given to a person or corporation intending to keep or sell gasoline would not, in my opinion, exempt such lessee from the provisions of law requiring a license for that purpose.

Very truly yours,

Henry C. Attwill, *Attorney-General.*

War Service — State Pay — Drafted Men not entitled to.

The State pay of $10 a month provided for by Gen. St. 1917, c. 211, as extended by Gen. St. 1917, c. 332, is not available to persons drafted from this Commonwealth into the military service of the United States under the provisions of the Act of Congress of May 18, 1917.

Aug. 1, 1917.

Hon. Charles L. Burrill, *Treasurer and Receiver-General.*

Dear Sir: — You have asked my opinion as to whether Gen. St. 1917, c. 211, as extended by Gen. St. 1917, c. 332, applies to men who are drafted into the military service of the

United States under the provisions of the Selective Service Law, so called, approved May 18, 1917.

Gen. St. 1917, c. 211, is entitled "An Act to provide State pay for soldiers and sailors from this Commonwealth in the volunteer service of the United States." Section 1 provides, in part, as follows: —

> There shall be allowed and paid out of the treasury of the commonwealth to each non-commissioned officer, soldier and sailor, who has been, or is hereafter, mustered into the military or naval service of the United States as a part of the quota of this commonwealth for service in the United States or in any foreign county, the sum of ten dollars per month.

By Gen. St. 1917, c. 332, the last-mentioned statute is extended so as to apply to "any non-commissioned officer or enlisted man having a residence of at least six months within this state and serving to the credit of this commonwealth in the regular or volunteer forces of the United States army, navy or marine corps, whose federal service began subsequent to" Feb. 3, 1917.

This last-mentioned statute was approved on May 25, 1917, and thus after the enactment of the Selective Service Law. It is obvious, however, that it cannot apply to men drafted into the military service of the United States under that act. Men drafted into service under this act cannot, of course, be said to be serving in the "volunteer forces of the United States army;" nor are they serving in the regular forces of that army. This is made plain by the terms of the Selective Service Law. It is entitled "An Act to authorize the President to increase temporarily the military establishment of the United States." On account of the existing emergency the President is authorized to raise by draft, organize and equip certain additional forces, and the men so drafted are to serve for the period of the existing emergency, unless sooner discharged. It is plain, therefore, that the forces raised by the Selective Service Law are not regular forces of the United States Army as permanently established by the Federal statutes, but constitute merely special forces temporarily added to the military establishment of the United States for and during the period of a particular emergency.

Accordingly, it becomes necessary to determine whether the men drafted under this Federal law, and mustered into

service thereunder, have been "mustered into the military or naval service of the United States as a part of the quota of this commonwealth for service in the United States or in any foreign country," within the meaning of section 1 of chapter 211. On May 2, 1917, when this chapter was approved and took effect, as I pointed out to you in the opinion rendered you on June 6 last, the only quota assigned to this Commonwealth by the Federal government was that of the National Guard. Section 2 of the Selective Service Law, subsequently enacted by Congress, provides for the assignment of quotas for the several states and territories. The question raised is whether the language of chapter 211 is broad enough to include such quotas assigned under the provisions of that law, which was not in force when chapter 211 was enacted.

The last-mentioned statute originated in a message sent by the Governor to the General Court on April 2, 1917, in which the following recommendations were made: —

> Three regiments of the National Guard of the Commonwealth have been called by the President of the United States and are now in the Federal service. How long this service will continue or how many men of our Guard may be called to serve with them cannot now be known, but we have the same situation that arose last summer after the Legislature was prorogued and that was dealt with by it when it came together again. The pay allowed by the national government is only $15 a month, or scarcely more than the pay of the soldier fifty years ago. The last Legislature by an act passed in September, 1916, granted a supplementary pay of $10 a month to each non-commissioned officer and soldier who had been called to do service at the Mexican Border.
>
> I recommend that you make similar provision in favor of the non-commissioned officers and men of the National Guard who have been or who shall be summoned into the national service. The object of this recommendation is to establish the aggregate pay which the men shall receive from the national and State government together at $25 a month. If the national government should raise the pay, as it probably will do, to that extent the amount involved in my recommendation would be correspondingly decreased.

A bill was submitted with this message, which was enacted without change so far as the language now under discussion is concerned. This history of the statute rather points to the conclusion that it was intended to apply only to the

members of the National Guard. The fact that it was thought necessary thereafter to extend the rights thus granted by the provision already quoted from chapter 332 points also in the same direction. It is significant that this last-mentioned statute, enacted after the approval of the Selective Service Law, makes no reference to it or to men summoned into service in accordance with its provisions.

Though the language of section 1 of chapter 211 is not entirely clear, the title of the chapter seems to indicate an intent of the Legislature to restrict its application to volunteers. It is well settled that reference to a title is permissible when the enacting clauses of the statute are not free from doubt. The title states it to be the purpose of the act "to provide State pay for soldiers and sailors from this Commonwealth in the volunteer service of the United States." The two statutes under consideration were apparently designed to provide more adequate pay for the members of the National Guard when summoned into the Federal service, and to encourage voluntary enlistments in the various branches of the military service of the United States. Under all the circumstances it is my opinion that the provisions of neither chapter 211 nor chapter 332 of the General Acts of 1917 apply to men drafted into the military service of the United States under the provisions of the Selective Service Law.

I reach the conclusion just stated with less hesitation because of the fact that the payments authorized by these statutes are to continue only until Jan. 15, 1918. Even if construed as applicable to drafted men, they could be given only when such men were actually mustered into service, and would necessarily terminate on January 15 next. On or before that date the General Court will probably be obliged to consider the question of extending or modifying the provisions for these payments. It can at that time deal with the case of men drafted into service in such manner as is deemed appropriate.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

War Service — Aid by Cities and Towns to Dependents of Persons drafted into.

The wife, widow, children or other dependents of a person drafted into the military service of the United States under the Selective Service Law, so called, are eligible to receive the aid authorized by Gen. St. 1917, c. 179, from the city or town of which the person so drafted was an inhabitant and in which he was residing.

Aug. 1, 1917.

Mr. Richard R. Flynn, *Commissioner of State Aid and Pensions.*

Dear Sir: — You have requested my opinion as to whether the dependents of men drafted into the military service of the United States under the provisions of the Selective Service Law are entitled to receive aid under the provisions of Gen. St. 1917, c. 179.

I have to-day advised the Treasurer and Receiver-General that the provisions of Gen. St. 1917, c. 211, as extended by Gen. St. 1917, c. 332, do not apply to such drafted men. The language of chapter 179, however, is quite different, and, in my opinion, requires a different conclusion. Section 1 is as follows: —

> Any city or town may raise money by taxation or otherwise, and, if necessary, expend the same by the officers authorized by law to furnish state and military aid, for the benefit of the wife, widow, children under sixteen years of age, or any child dependent by reason of physical or mental incapacity, or the actually dependent parents, brothers and sisters, of any inhabitant of such city or town, having a residence and actually residing therein, who has enlisted, and responded to the call of the president or war department, or hereafter shall duly be enlisted, and who has been or shall be mustered into the military or naval service of the United States as a part of the quota of this commonwealth which may be called for service in the United States or in any foreign country, up to January fifteenth, nineteen hundred and nineteen, unless the said service is sooner terminated, in the same manner and under the same limitations, except as hereinafter provided, as state aid is paid to dependent relatives of soldiers or sailors of the civil war and of the war with Spain.

It thus applies to the dependents of any inhabitant coming within its terms "who has enlisted, and responded to the call of the president or war department, or hereafter shall duly be enlisted, and who has been or shall be mustered into the military or naval service of the United States as a part of the quota of this commonwealth which may be called for service

in the United States or in any foreign country." The Selective Service Law provides for the assignment of quota for the several states and territories, and in the assigning of these quotas credit is given for members of the National Guard in the service of the United States on April 1, 1917, and for men subsequently enlisted as members of the Regular Army or National Guard. The language of chapter 179 is broad enough to include the quota of the Commonwealth under the Selective Service Law, and there is nothing in the title of chapter 179 which would restrict the meaning of this language.

In *Sheffield* v. *Otis*, 107 Mass. 282, 284, our Supreme Judicial Court, in construing a statute containing somewhat similar language, thus defined the meaning of the word "enlist:"—

> It seems clear to us that the case is not taken out of the statute by the fact that Walley was drafted, and did not volunteer to enter the service. The words of the statute are, "any person who shall have been duly enlisted," and not any person who shall voluntarily enlist. By the primary meaning of the word, a person is "enlisted" whose name is duly entered upon the military rolls, and it applies to those who are drafted as well as to those who volunteer. Both are enlisted. The word is used in this sense in the articles of war for the government of the armies of the United States. The eleventh article provides that, "after a non-commissioned officer or soldier shall have been duly enlisted and sworn, he shall not be dismissed the service without a discharge in writing." The twentieth article provides that "all officers and soldiers who have received pay, or have been duly enlisted in the service of the United States, and shall be convicted of having deserted the same, shall suffer death or such other punishment as by sentence of court martial shall be inflicted." U. S. St. 1806, c. 20; 2 U. S. Sts. at Large, 361, 362. In both of these articles the term "duly enlisted" necessarily includes soldiers who have been drafted, as well as those who have entered the service as volunteers.

In view of the foregoing definition it is my opinion that a person drafted and mustered into service under the Selective Service Law is a person who has been "enlisted, . . . and . . . mustered into the military or naval service of the United States," within the meaning of chapter 179. In my opinion, therefore, this chapter should be construed as applying to the dependents of men thus drafted.

I see no inconsistency in reaching different conclusions as to the application in this respect of chapters 179 and 211. The latter relates merely to the compensation of enlisted men, and a substantial portion of its purpose was to encourage vol-

untary enlistments. The former, however, applies to all persons who are dependent for their means of sustenance upon inhabitants of the Commonwealth engaged in military service. The duty of the Commonwealth toward all such dependents is the same without regard to the class of service in which the person upon whom they are dependent is engaged.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Club Charter — Cause for Revocation by Secretary of Commonwealth.

A conviction under the provisions of R. L., c. 100, § 88, does not warrant action by the Secretary of the Commonwealth under R. L., c. 100, § 89, relating to the revocation of club charters.

AUG. 8, 1917.

Hon. ALBERT P. LANGTRY, *Secretary of the Commonwealth.*

DEAR SIR: — You have requested my opinion as to whether the charter of a club incorporated under the provisions of R. L., c. 125, should be declared void, in accordance with the provisions of R. L., c. 100, § 89, on evidence that a certain person has been found guilty of a charge that he did "without legal authority keep and maintain a certain building and place . . . used by a club . . . for the purpose of illegally selling, distributing and dispensing intoxicating liquors to its members and others to the common nuisance of all the people."

Such a complaint is preferred under R. L., c. 100, § 88.

The provision of section 89 is: —

> If any person is convicted of exposing and keeping for sale or selling intoxicating liquor on the premises occupied by any club . . . or of illegal gaming upon said premises, . . . the selectmen of the town . . . shall immediately notify the secretary of the commonwealth, and he shall, upon receipt of such notice, declare the charter of said club void.

It thus appears that the sale or keeping for sale of intoxicating liquors is a distinct offence from that prescribed by section 88, under which the conviction in the present case was had, and, accordingly, it does not appear that any person has been convicted of exposing and keeping for sale intoxicating liquors on the premises occupied by the club in question.

Furthermore, it is to be observed that a conviction under the provisions of section 88 is sustained by proof of either a

sale and distribution or a dispensing of intoxicating liquors, and, therefore, a conviction may occur under the section where no illegal sale took place.

As this is a penal statute, it is to be construed strictly, and, accordingly, I am of the opinion that such conviction does not warrant your taking action under the provisions of R. L., c. 100, § 89.

Very truly yours,
HENRY C. ATTWILL, *Attorney-General.*

Steam Boilers — Board of Boiler Rules — Power to exempt from Operation of Rules.

Under St. 1907, c. 465, the Board of Boiler Rules has no power, even in time of war, to grant special permission to any person to install in this Commonwealth boilers which do not conform to the rules of construction formulated by said Board.

AUG. 15, 1917.

His Excellency SAMUEL W. MCCALL, *Governor of the Commonwealth.*

SIR: — You have requested my opinion as to the legality of a suggested amendment to the rules formulated by the Board of Boiler Rules which in substance would permit, during a time of war, the installation within this Commonwealth of boilers which do not conform to the rules of construction formulated by the Board of Boiler Rules, upon application made to that Board and permission granted by it.

The law governing the regulation of steam boilers is found in St. 1907, c. 465, as amended.

Section 1 of that chapter, as originally enacted, contained the following: —

> No certificate of inspection shall be granted on any boiler installed after May first, nineteen hundred and eight, which does not conform to the rules of construction formulated by the board of boiler rules.

It was undoubtedly the purpose of this act to forbid, in general, and, subject to the exceptions found therein, to prohibit, the operation of boilers which had not been inspected and a certificate of inspection issued therefor. Although the original act may not in its criminal provisions have effectually enforced its purpose, the later amendments have cured any such defects.

By section 24 of that act the Board of Boiler Rules was created. By section 26 it was provided: —

It shall be the duty of the board of boiler rules to formulate rules for the construction, installation and inspection of steam boilers, and for ascertaining the safe working pressure to be carried on said boilers, to prescribe tests, if they deem it necessary, to ascertain the qualities of materials used in the construction of boilers; to formulate rules regulating the construction and sizes of safety valves for boilers of different sizes and pressures, the construction, use and location of fusible safety plugs, appliances for indicating the pressure of steam and the level of water in the boiler, and such other appliances as the board may deem necessary to safety in operating steam boilers; and to make a standard form of certificate of inspection.

Under this statute as originally enacted it is certainly doubtful whether, in view of the provision of section 1 above quoted, it was within the power of the Board of Boiler Rules, in formulating the rules which, by section 26, it was authorized to make, to provide that any person might by special permission from that Board violate the rules made.

It is apparent that the purpose of the statute in this respect and of the rules to be formulated by this Board was to secure "safety in operating steam boilers;" and there would seem to be no reason for exempting special persons from the operation of laws and rules necessary to secure such safety.

If any doubt upon this point could exist under the original law, it would seem to have been removed by the later amendments.

St. 1909, c. 393, § 1, amended the original section 1 by inserting the following: —

A boiler in this commonwealth at the time of the passage of this act, which does not conform to the rules of construction formulated by the board of boiler rules may be installed after a thorough internal and external inspection and hydrostatic pressure test by a member of the boiler inspection department of the district police, or by an inspector holding a certificate of competency as an inspector of steam boilers, as provided by section six of chapter four hundred and sixty-five of the acts of the year nineteen hundred and seven, and employed by the company insuring the boiler. The pressure allowed on such boilers is to be ascertained by rules formulated by the board of boiler rules.

This express provision of the Legislature for installation of certain boilers which might not conform to the rules of construction formulated by the Board of Boiler Rules would naturally exclude from such special favor boilers not included

within the class designated, to wit: boilers in this Commonwealth at the time of the passage of that act.

This same act of the year 1909 amended section 26 by the insertion of certain provisions in part as follows: —

When a person desires to manufacture a special type of boiler the design of which is not covered by the rules formulated by the board of boiler rules, he shall submit drawings and specifications of such boiler to said board, which, if it approves, shall permit the construction of the same.

This provision for special type of boilers not covered by the rules also impliedly excludes the idea of special permission by the Board of Boiler Rules for the construction or installation of boilers in fact covered by the rules but contrary to their terms.

As stated above, the design and purpose of these statutes and rules is to prevent the operation of boilers which cannot be operated with safety. It would seem to be undesirable that boilers which cannot be operated with safety should be installed or used at any time. If, on the other hand, the rules formulated by the Board of Boiler Rules now existing prevent the installation or operation of boilers which can be used with safety to the public, it would seem to furnish a reason for amending the rules so as to permit the installation and use of such boilers, regardless of the persons desiring to use the same, rather than for the creation of a rule permitting the use by some and refusing it to others.

For the reasons stated above, I am of the opinion that such a rule as is referred to in your request is not authorized by the statutes upon this subject.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Board of Parole — Permits to be at Liberty — Cannot be voted to a Convict while actually confined in Insane Hospital.

A person who has been sentenced to the Massachusetts Reformatory, the Reformatory for Women, the State Prison or the Prison Camp and Hospital, and who has been committed under St. 1909, c. 504, § 105, from any of said institutions to a State hospital for the insane, cannot be voted a permit to be at liberty by the Board of Parole of the Massachusetts Bureau of Prisons so long as he is actually confined in such insane hospital.

Sept. 8, 1917.

Mr. Frank A. Brooks, *Chairman, Board of Parole of the Massachusetts Bureau of Prisons.*

Dear Sir: — I acknowledge receipt of your communication in which you state the following facts: —

A person was committed to the reformatory at Concord on the 18th of June, 1914. On the 24th of September, 1915, under the provisions of St. 1909, c. 504, § 105, he was committed to the State Hospital at Bridgewater. It now seems advisable to the Commission on Mental Diseases and to the Board of Parole that this prisoner be transferred to the control of the authorities of the State of Connecticut having charge of insane persons.

You request my opinion upon the question of whether your Board has authority under these circumstances to vote a permit to be at liberty to this man, he now being actually in confinement at the Bridgewater State Hospital.

You further request my opinion as to whether, if he had been transferred to the Bridgewater State Hospital from the State Prison, the Prison Camp and Hospital, or (being a woman) from the Reformatory for Women at Sherborn, the Board would have such authority.

R. L., c. 225, § 117, as amended by St. 1906, c. 244, authorizes the Prison Commissioners to issue a permit to be at liberty to "a prisoner in the Massachusetts reformatory, or a prisoner who has been removed therefrom to a jail or house of correction," under the conditions therein set forth.

Section 118 of this chapter conferred a similar authority upon the Prison Commissioners in relation to "a prisoner in the reformatory prison for women, or a prisoner who has been removed therefrom to a jail or house of correction."

No permits to be at liberty could be issued to a prisoner in the State Prison who had been sentenced thereto for a crime committed after Jan. 1, 1896, until after his minimum term of sentence had expired, until the passage of St. 1911, c. 451. This statute authorized the granting by the Prison Commissioners, under certain conditions, of "a special permit to be at liberty from the state prison to a prisoner held therein." The provisions of this act were extended by St. 1912, c. 103, to prisoners transferred from the State Prison to the Massachusetts Reformatory.

St. 1906, c. 243, relating to the Prison Camp and Hospital, provided that all laws relative to the temporary industrial camp for prisoners should apply to the Prison Camp and Hospital. St. 1904, c. 243, relating to the industrial camp for prisoners, provided that: —

> The prison commissioners in their discretion may issue to any prisoner held at said camp a permit to be at liberty upon such terms and conditions as they shall prescribe.

St. 1913, c. 829, as amended by Gen. St. 1915, c. 206, creating the Board of Parole for the State Prison and the Massachusetts Reformatory, and the Board of Parole for the Reformatory for Women, provided, —

> All the powers of the board of prison commissioners relating to the granting of permits to be at liberty from the state prison, the Massachusetts reformatory, the reformatory for women and the prison camp and hospital are hereby transferred to and vested in the several boards of parole for said institutions.

By Gen. St. 1916, c. 241, the Board of Parole for the State Prison and the Massachusetts Reformatory and the Board of Parole for the Reformatory for Women were abolished, and all the powers and duties of said Boards of Parole were transferred to the Board of Parole of the Massachusetts Bureau of Prisons, which was thereby established. All other powers and duties belonging to the Board of Prison Commissioners were transferred to the Director of said Massachusetts Bureau of Prisons, and the Board of Prison Commissioners was abolished.

It may be noted that the powers transferred by St. 1913, c. 829, were limited to the issuance of permits to be at liberty from the State Prison, the Massachusetts Reformatory and the Reformatory for Women. It did not include the authority to issue such permits to prisoners who had been removed from the Massachusetts Reformatory or the Reformatory for Women to a jail or house of correction, but this authority remained in the Board of Prison Commissioners, and was transferred by Gen. St. 1916, c. 241, to the Director of the Massachusetts Bureau of Prisons instead of to the Board of Parole. This situation, however, was changed by Gen. St. 1917, c. 245, which provides that —

All the powers and duties of the director of prisons relating to the granting of permits to be at liberty to prisoners who have been removed from the Massachusetts reformatory to a jail or house of correction, and to prisoners who have been removed from the reformatory for women to a jail or house of correction, are hereby transferred to, and shall hereafter be exercised by, the board of parole of the Massachusetts bureau of prisons.

Since the passage of the act last quoted, your Board possesses all the powers in relation to the granting of permits to be at liberty theretofore exercised by the Board of Prison Commissioners.

The difficulty, however, which, in my judgment, prevents your Board from issuing a permit to be at liberty to the prisoner in question is that, so long as he is actually confined in the Bridgewater State Hospital under order of the court, he cannot be considered to be "a prisoner in the Massachusetts Reformatory," within the meaning of R. L., c. 225, § 117, as amended by St. 1906, c. 224.

St. 1909, c. 504, § 105, is as follows: —

The state board of insanity shall designate two persons, experts in insanity, to examine prisoners in the state prison, the Massachusetts reformatory, or the reformatory prison for women, who are alleged to be insane. If any such prisoner appears to be insane, the warden or superintendent shall notify one or both of the persons so designated, who shall, with the physician of the prison, examine the prisoner and report the result of their investigation to the superior court of the county in which the prison is situated. If, upon such report, the court considers the prisoner to be insane and his removal expedient, it shall issue a warrant, directed to the warden or superintendent, authorizing him to cause the prisoner, if a male, to be removed to the Bridgewater state hospital and, if a female, to be removed to one of the state hospitals for the insane, there to be kept until, in the judgment of the superintendent and the trustees of the hospital to which the prisoner has been committed, he or she should be returned to prison. When the superintendent and trustees determine that the prisoner should be so returned, they shall so certify upon the said warrant, and notice, accompanied by a written statement regarding the mental condition of the prisoner, shall be given to the warden or superintendent of the prison, who shall thereupon cause the prisoner to be reconveyed to the prison, there to remain pursuant to the original sentence, computing the time of his detention or confinement in the hospital as part of the term of his imprisonment.

When a prisoner has been removed under the provisions of this section from the State Prison, the Massachusetts Reformatory or the Reformatory Prison for Women to a State hospital for the insane, he must, in my judgment, be kept there until he is in fit condition to be reconveyed to the prison or reformatory from which he was sent. When a prisoner has been so reconveyed, your Board of course has authority to grant to him a permit to be at liberty, under the conditions prescribed by the statutes first above quoted; but so long as he is actually confined in a State hospital for the insane I am of the opinion that your Board has no jurisdiction over him in this respect. Accordingly, the answer to your inquiry must be in the negative.

In reply to your further inquiry I beg to advise that, in my opinion, it would make no difference if the prisoner had been committed to the Bridgewater State Hospital from the State Prison, the Reformatory for Women or the Prison Camp and Hospital.

Yours truly,

HENRY C. ATTWILL, *Attorney-General.*

War Service — Employees of Commonwealth — Payment of Difference in Compensation to those drafted.

An employee of the Commonwealth who has been drafted into the military service of the United States under the Selective Service Law, so called, is entitled to the benefits provided by Gen. St. 1917, c. 301.

SEPT. 18, 1917.

Hon. ALONZO B. COOK, *Auditor of the Commonwealth.*

DEAR SIR: — You request my opinion as to whether a State employee who is drafted into the military service of the United States under the so-called Selective Service Law is entitled to the difference between his military pay and the amount which he is receiving from the Commonwealth under the provisions of Gen. St. 1917, c. 301. Section 1 of that statute provides, in part, as follows: —

There shall be allowed and paid, out of the treasury of the commonwealth, to every employee of the commonwealth who has been or is hereafter mustered into the military or naval service of the United States during the present war, an amount equal to the difference between the compensation received by him from the United States, plus

the compensation received as extra military pay, received from the commonwealth, and the amount which he was receiving from the commonwealth at the time when he was mustered in. . . .

This language is very broad, and applies to every employee of the Commonwealth "who has been or is hereafter mustered into the military or naval service of the United States during the present war." Plainly, employees who are drafted into that service come within this language. They are, in my opinion, entitled to the benefits of the act from the date when they are thus mustered into the military service.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

War Service — Employees of Commonwealth attending Officers' Training Camps — Whether mustered into the Military Service of the United States.

An employee of the Commonwealth who is serving at an officers' training camp conducted under authority of section 54 of the National Defence Act "has been . . . mustered into the military . . . service of the United States," and is, accordingly, entitled to the benefits of Gen. St. 1917, c. 301.

SEPT. 18, 1917.

Hon. ALONZO B. COOK, *Auditor of the Commonwealth.*

DEAR SIR: — You have requested my opinion as to whether employees of the Commonwealth who attend officers' training camps conducted at Plattsburg and elsewhere are entitled to the benefits of Gen. St. 1917, c. 301. Section 1 of that act provides, in part, as follows: —

There shall be allowed and paid, out of the treasury of the commonwealth, to every employee of the commonwealth who has been or is hereafter mustered into the military or naval service of the United States during the present war, an amount equal to the difference between the compensation received by him from the United States, plus the compensation received as extra military pay, received from the commonwealth, and the amount which he was receiving from the commonwealth at the time when he was mustered in. . . .

These officers' training camps are conducted by the War Department under the authority of section 54 of the National Defence Act. It is there provided that these camps are to be

conducted "under such terms of enlistment and regulations as may be prescribed by the Secretary of War." He has prescribed that persons admitted to these camps for training shall be required to enlist for a period of three months, though this enlistment carries with it an obligation to undertake service in the training camp only. It is also required that a person attending such a camp shall agree to accept such commission in the army of the United States as he may be tendered by the Secretary of War.

The question whether a person serving in one of these camps has been "mustered into the military service of the United States" must be determined largely by the attitude of the United States, particularly the War Department, toward these men. If the War Department considers them and deals with them as in the military service of the government, the Commonwealth ought to follow that ruling. Accordingly, I have delayed replying to your letter until I could learn what that attitude was. I have just received a letter from the Judge Advocate-General of the United States, which reads in part as follows: —

This office, in an opinion dated June 30, 1917, on the question whether candidates for commissions undergoing training in the reserve officers' training camps are to be considered in the military service of the United States for campaign badge purposes, or whether they are to be considered civilians until receiving commissions, held that such candidates should be considered to be in the military service of the United States, and that campaign badges may properly be issued to such of them as might be entitled thereto, using the following language respecting their status: —

> Upon inquiry at the office of The Adjutant-General this office has been informed that the men now in training camps *have been enlisted* for three months under the provisions of section 54 of the National Defense Act, authorizing the training of "such citizens as may be selected for instruction and training, upon their application and *under such terms of enlistment* and regulations as may be prescribed by the Secretary of War; . . ."

Being enlisted in the service of the United States they are, for the term of their enlistment, members of the military force of the United States, although the purpose of their membership is solely training for future use as commissioned officers.

In view of this ruling I deem it my duty to advise you that employees of the Commonwealth while attending these training camps, so far as they are conducted under present condi-

tions, are to be regarded as "mustered into the military . . . service of the United States," and that, accordingly, they are entitled to the benefits of this statute.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

War Service — Employees of Commonwealth drafted into Military Service — Application of Civil Service Laws and Rules to.

Under R. L., c. 19, § 25, any person in the classified public service of the Commonwealth who has been drafted into the military service of the United States under the Selective Service Law, so called, may be appointed to or employed in his former or a similar position in the classified public service within one year after his honorable discharge from such military service, without application or examination, and Civil Service Rules 31 and 45 do not apply to such a situation in so far as they are inconsistent with this statute.

OCT. 16, 1917.

MR. CHARLES E. BURBANK, *Supervisor of Administration.*

DEAR SIR: — You have requested my opinion upon behalf of the committee on civil service of the Executive Council upon the question of whether R. L., c. 19, § 25, protects employees of the Commonwealth who have been drafted into the military service of the United States so that they may without difficulty return to their positions in the State service when their military service is finished; and whether the present Civil Service Rules 31 and 45 conflict in any way with R. L., c. 19, § 25, or in any way jeopardize the positions of State employees who have entered the military or naval service of the United States.

R. L., c. 19, § 25, is as follows: —

> Any person in the classified public service of the commonwealth or of any city or town thereof who resigns such office or leaves such service for the purpose of enlisting and serving in the army or navy of the United States or in the militia of this commonwealth in time of war and so enlists and serves, may at any time within one year after his honorable discharge from such military or naval service be appointed to or employed in his former or a similar position or employment, without application or examination.

The difficulty presented by your inquiry is whether a person selected for military service and inducted into the military

forces of the United States under the provisions of the Act of Congress approved May 18 can be said to have enlisted, within the meaning of the act above quoted. In considering a similar question our Supreme Judicial Court said, in the case of *Sheffield* v. *Otis*, 107 Mass. 282: —

> It seems clear to us that the case is not taken out of the statute by the fact that Walley was drafted, and did not volunteer to enter the service. The words of the statute are, "any person who shall have been duly enlisted," and not any person who shall voluntarily enlist. By the primary meaning of the word, a person is "enlisted" whose name is duly entered upon the military rolls, and it applies to those who are drafted as well as to those who volunteer. Both are enlisted.

While it is true that R. L., c. 19, § 25 (originally St. 1898, c. 454), was enacted at the time of our war with Spain, at which time no draft law was in effect, or, so far as is known, under contemplation, nevertheless, I am of the opinion that an employee of the Commonwealth who is drafted under the provisions of the Selective Service Law, so called, comes within the purview of this statute, and may be appointed to or employed in his former or a similar position or employment after his honorable discharge from military or naval service without application or examination.

I am fortified in this opinion by reason of the fact that under the provisions of Gen. St. 1917, c. 301, employees of the Commonwealth who are mustered into the military or naval service of the United States during the present war are paid by the Commonwealth an amount equal to the difference between the compensation they were receiving at the time when they were mustered in and the amount which they receive while in the military service. In an opinion given under date of Sept. 18, 1917, to the Auditor of the Commonwealth this department ruled that the provisions of this act included drafted men.

It would seem that it was in the mind of the Legislature that these men were to be considered as temporarily absent from the service of the Commonwealth as on a leave of absence, and that their positions in the classified civil service were not to be affected by their absence until the cause of such absence had been removed.

Furthermore, I beg to advise that Civil Service Rules 31 and 45, in my opinion, do not conflict in any way with the

statute in question nor jeopardize the positions of State employees who have entered the military or naval service of the United States. All rules made by the Civil Service Commission must be consistent with law, and they cannot change the force or effect of this statute. General rules of the Civil Service Commission relating to reinstatements and appointments, such as the ones to which you refer, must be interpreted as not applying to persons within the purview of said section 25 in so far as these rules are inconsistent with the terms of that section. Accordingly, the answer to your second question must be in the negative.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Street Railways — Location — Power to mortgage — Rights of Purchaser at Foreclosure Sale.

The location of a street railway company may be included in a mortgage given by it to secure a bond issue, and upon foreclosure of the mortgage may pass to the purchaser and his successors in title.

The signature of one of the subscribers to the agreement of organization of a proposed street railway company made by an attorney is a sufficient and proper signature, provided the attorney had sufficient authority.

OCT. 26, 1917.

Public Service Commission.

GENTLEMEN: — In connection with the application of a street railway company for a certificate under St. 1906, c. 463, pt. III, § 9, you have requested my opinion upon the following questions: —

1. It appears that said company, in process of organization, has acquired from a purchaser at a foreclosure sale, made by the trustee under a mortgage given to secure an issue of bonds by a street railway company, "all and singular the lines of railway," "lands," "real and leasehold estate," "franchises," "rights" and "privileges" of said mortgagor company. The question presented is whether by this means it has "obtained" "locations" "for a railway between the termini and substantially over the route set forth in the agreement of association," which is one of the conditions required by section 9 of part III of chapter 463 of the Acts of 1906.

In other words, does the location of a street railway company pass as a part of its grant under a mortgage given by it to secure a bond issue?

Under the provisions of R. L., c. 112, § 23, and the earlier act, St. 1889, c. 316, a street railway company is authorized to secure an issue of bonds "by a mortgage of a part or of the whole of the railway of such company and its equipments, franchise and other property, real and personal."

This language is sweeping in its terms, and, in my opinion, was intended to authorize the conveyance by mortgage of all of its property and rights. This conclusion is strengthened by the fact that R. L., c. 111, § 74, which, by the provisions of R. L., c. 112, § 24, is made applicable to street railway companies, provides: —

> A purchaser of a railroad at a sale under a valid foreclosure of a legal mortgage thereof and his successors in title, shall be subject to all and the same duties, liabilities and restrictions, and have all and the same powers and rights, relative to the construction, maintenance and operation of said railroad which the mortgagor was subject to and had at the time of said sale.

The applicability of this provision to street railways was provided for by St. 1889, c. 316, § 3, referred to above.

It is apparent that in order for this authorization to become effective it is requisite that the locations of the street railway company should pass to the mortgagee and purchasers at a sale under a foreclosure.

By express provision of the section last quoted these rights pass equally to the successors in title of a purchaser at a foreclosure sale.

This provision of the statute is still in effect. See St. 1906, c. 463, pt. II, § 56, made applicable to street railways by pt. III, § 103.

It has been held by the court that these statutes are but declaratory of the law "as it exists without legislation in other jurisdictions, and as doubtless it would have been held to be in this Commonwealth upon general principles before the enactment of the statute." *Chadwick* v. *Old Colony R.R.*, 171 Mass. 239, 244.

Accordingly, I am of the opinion that by conveyance to the said street railway company from a purchaser at a foreclosure sale it may properly be found to have obtained locations as required by St. 1906, c. 463, pt. III, § 9.

2. The question is also raised as to whether signature of one of the subscribers to the agreement for organization of the proposed street railway company made by an attorney, expressly authorized thereto in writing, is a sufficient and proper signature.

In my opinion, the requirement of the statute is satisfied when there is an agreement of association so executed as to be legally binding upon the individual associates. I see no reason for doubting the validity of such an agreement executed by an attorney, provided the authority in that attorney sufficiently appears.

It is stated that the particular person whose name is signed by power of attorney is one of the directors. The foregoing opinion relates merely to the agreement of association, and does not extend to any of the preliminary papers which are required by the statute to be executed by the preliminary officers or directors.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Laborers — Regularly employed by Cities and Towns for more than a Year — Determination of Who are.

A person whose employment has not been terminated for more than a year, and which is of such a nature as to require the services of such person the usual number of hours a day throughout the year, is "regularly employed" for more than a year, within the meaning of St. 1914, c. 217, § 1, even though he has been absent from his work for some time during the year on account of sickness or other cause.

OCT. 31, 1917.

State Board of Labor and Industries.

GENTLEMEN: — You request my opinion as to the interpretation of the word "regularly" as used in St. 1914, c. 217, § 1. That section reads as follows: —

All persons classified as laborers, or doing the work of laborers, and regularly employed by cities or towns for more than one year, shall be granted a vacation of not less than two weeks during each year of their employment, without loss of pay.

You state that certain cities and towns have arbitrarily fixed the number of days which shall constitute regular employment under this act; others leave it to the discretion of

the employing authorities; while still others have prepared a list of those employed all the time, and hold that these only are entitled to vacation.

While it is difficult in a matter of this kind to prescribe a general rule which will apply to all cases which may hereafter arise, it is my opinion that the word "regularly" in this act is used in the sense of continuously, as distinguished from intermittently or at intervals. This does not mean, however, that a person must be actually at work during all of the working days of the year. The fact that he was absent from his work on account of sickness or other cause which did not constitute a termination of his employment would not prevent him from being regularly employed within the meaning of this act. On the other hand, if his employment had terminated during the year this fact would prevent him from being regularly employed, although he was re-employed by the city or town a short time afterwards. The test, in my judgment, is whether or not the employment of the man has terminated within the year so as to make it necessary for him to be re-employed before he starts to work again. If it has been so terminated, he cannot be said to be regularly employed for more than one year, within the meaning of the act above quoted. If, however, it is not terminated for more than a year, and the nature of his employment is such as to require his services for the usual number of hours a day throughout the year, he is, in my opinion, regularly employed within the meaning of this act.

Yours truly,

HENRY C. ATTWILL, *Attorney-General.*

Elections — Corrupt Practices Act — Promise by Candidate to donate his Salary to Particular Charity.

A promise made by a candidate for office of representative in the General Court to donate his salary, if elected, to the Red Cross would be a violation of the corrupt practices act.

Nov. 1, 1917.

Mr. HERBERT H. BOYNTON, *Deputy and Acting Secretary of the Commonwealth.*

DEAR SIR: — You request my opinion upon the question of whether a promise by a candidate for the position of repre-

sentative in the General Court to donate his salary, in case he is elected, to the Red Cross would "conflict with paragraph 4 in section 347 of the corrupt practices act."

Section 347 of this act (St. 1913, c. 835) only forbids a candidate to promise to appoint or assist in securing the appointment, nomination or election of another person to a public position or employment, or to a position of honor, trust or emolument. This section plainly does not apply to the promise in question.

Section 348 of this act, as superseded by St. 1914, c. 783, § 2, provides as follows: —

> No person shall, in order to aid or promote his own nomination or election to a public office, either directly or indirectly, himself or through another person, give, pay, expend or contribute, or promise to give, pay, expend or contribute any money or other thing of value in excess of the following amounts: —
>
> . . . . . .
>
> For each Representative in the General Court to which a district is entitled, ... $100
>
> . . . . . .
>
> The gift, payment, contribution or promise of any money or thing of value in excess of the sums hereby authorized to be expended for the several offices, by a candidate directly or indirectly, or by any other person or persons for his benefit, excepting political committees as hereinafter provided, shall be deemed a corrupt practice.

This section prohibits all promises by candidates to pay money in excess of the amount named in order to aid their election. I am inclined to the view that a promise of the character described is to be construed as a promise made for the purpose of aiding the election of the candidate. Accordingly, I am of the opinion that it is prohibited by the terms of the statute.

Yours truly,

HENRY C. ATTWILL, *Attorney-General.*

Trial Justices — Jurisdiction of.

The trial justice of the town of North Andover has no jurisdiction over cases arising in the town of Methuen, but all such cases as could be heard by the trial justice of Methuen may, during his incapacity, be heard and determined by the District Court of Lawrence.

Nov. 6, 1917.

His Excellency Samuel W. McCall, *Governor of the Commonwealth.*

Sir: — You have requested my opinion as to the legality of the trial justice of the town of North Andover sitting on cases in the town of Methuen, the trial justice in the town of Methuen being incapacitated at the present time.

Formerly trial justices were appointed under the provisions of R. L., c. 161, in the several counties, and their jurisdiction extended throughout the counties for which they were appointed. The law was changed in this respect by Gen. St. 1917, c. 326, which provides for the designation of justices of the peace as trial justices in certain towns therein specified, including North Andover and Methuen. Section 1 of this act, superseding R. L., c. 161, § 10, expressly confers authority upon such trial justices to receive complaints, issue warrants and try criminal cases within the towns where they are resident at the time when they are appointed and commissioned, "except that the trial justices resident in Barre and Hardwick shall have concurrent jurisdiction of offences committed in the towns of New Braintree and Oakham." This section, taken in connection with the other provisions of this act, seems to me clearly to indicate that the intention of the Legislature was to restrict the jurisdiction of these trial justices to the towns where they were resident at the time of their appointment, and to prevent their exercising jurisdiction as trial justices within any other towns.

Accordingly, I am of the opinion that the trial justice of the town of North Andover may not hear and determine cases arising in the town of Methuen.

The fact that the trial justice in the town of Methuen is at present incapacitated to perform his duties as such trial justice does not, however, seriously embarrass the administration of the law in that town, inasmuch as there is a police court which has jurisdiction of cases arising in that town which is concurrent with the trial justice. By St. 1914, c. 532, the towns of

North Andover, Andover and Methuen were annexed to, and made a part of, the judicial district of the police court of Lawrence for civil business, and the name of that court was changed to the District Court of Lawrence. Gen. St. 1917, c. 302, § 1, provides that all towns now within the judicial district of any district court for civil business shall be annexed to, and made a part of, the judicial district of such court for all kinds of business. Section 2 of this act provides that the jurisdiction acquired by any court under the provisions of section 1 shall, in all towns which now or hereafter have a trial justice resident and holding court therein, be exclusive of such trial justice only as to matters without the jurisdiction of a trial justice and concurrent with the trial justice as to all matters within his jurisdiction. It seems clear, therefore, that all cases which could be heard by the trial justice of Methuen can, during his incapacity, be as readily heard and determined by the District Court of Lawrence.

Yours truly,

HENRY C. ATTWILL, *Attorney-General.*

War Service — State Pay — Enlistments in National Guard of Another State.

Citizens of this Commonwealth who have enlisted in the National Guard of another State are not entitled to the State pay from this Commonwealth of $10 a month provided for by Gen. St. 1917, cc. 211 and 332.

Nov. 13, 1917.

His Excellency SAMUEL W. MCCALL, *Governor of the Commonwealth.*

SIR: — You request my opinion as to whether certain citizens of the Commonwealth residing in Attleboro and its vicinity, who have enlisted in regiments of the Rhode Island National Guard, are entitled to the State pay from this Commonwealth of $10 a month granted by Gen. St. 1917, c. 211, as defined and extended by Gen. St. 1917, c. 332.

Section 1 of chapter 211 provides that this allowance shall be paid "to each non-commissioned officer, soldier and sailor, who has been, or is hereafter, mustered into the military or naval service of the United States as a part of the quota of this commonwealth for service in the United States or in any foreign country." At the time of the enactment of this stat-

ute the only quota in any manner assigned to the Commonwealth by the Federal government grew out of the provision in the National Defense Act regulating the numerical strength of the National Guard to be maintained by the Commonwealth.

Accordingly, on June 6 last, I advised the Treasurer and Receiver-General as follows: —

> In my opinion, therefore, the provision for State pay contained in chapter 211 applies at present only to the non-commissioned officers, soldiers and sailors of the National Guard of the Commonwealth, including therein any naval militia maintained by the Commonwealth, who have been mustered into the Federal service. It applies, however, to all such persons without condition as to length of residence in the Commonwealth.

Since this opinion was given, a further quota was assigned to the Commonwealth in connection with the draft under the Selective Service Law. After a full consideration of the matter, however, I was forced to the conclusion that neither chapter 211 nor chapter 332 applied to men called to service under that statute, and I have advised State officials upon whom the duties in connection with the administration of these statutes devolve to that effect. In my opinion, it follows that chapter 211 applies only to soldiers and sailors mustered into the National Guard of the Commonwealth, and cannot apply to men who enlist in the National Guard of another State. They become a part of the quota of that State and not a part of the quota of this Commonwealth.

Chapter 332 extends the rights granted by chapter 211 to "any non-commissioned officer or enlisted man having a residence of at least six months within this state and serving to the credit of this commonwealth in the regular or volunteer forces of the United States army, navy or marine corps, whose federal service began subsequent to said February third, nineteen hundred and seventeen." This provision, however, applies only to men serving in the United States Army, Navy or Marine Corps, and does not, in my opinion, apply to men serving in the National Guard of any State. Furthermore, it requires that the service shall be "to the credit of this commonwealth." That, in my opinion, at least requires that the Commonwealth shall have the credit of the service of such men in the records of the Federal government. It is obvious that

it cannot have such credit in the case under consideration, for the men referred to are serving as a part of the quota of Rhode Island in the National Guard of that State, and I know of no way in which it can appear in the records of the Federal government that this Commonwealth is to have the credit of such service.

Accordingly, in my opinion, the men to whom you refer are not entitled to the benefits of either chapter 211 or chapter 332 of the General Acts of 1917.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Militia — State Guard — Status of — Appropriations for.

The State Guard established under Gen. St. 1917, c. 148, does not have the same status as the National Guard, but is rather a part of the unorganized militia of the Commonwealth, temporarily organized in a limited way and for a limited purpose.

No part of the appropriations made by Spec. St. 1917, c. 292, for the land and naval forces of the Commonwealth may be used in organizing, maintaining and training the State Guard.

Nov. 15, 1917.

Col. JESSE F. STEVENS, *The Adjutant General.*

DEAR SIR: — You have submitted to me the following request for my opinion: —

The National Guard of this Commonwealth, which was formerly the only organized militia of the Commonwealth, has been called into the service of the United States, leaving within the State but five commissioned officers.

The Legislature, under Gen. St. 1917, c. 148, and under Gen. St. 1917, c. 342, § 10, created a military force from our unorganized militia, which has been called the State Guard.

Your opinion is respectfully requested as to how far appropriations created by the Legislature under Gen. St. 1917, c. 292, approved April 23, 1917, may be used in organizing, maintaining and training said State Guard.

The answer to your inquiry involves the determination of the status of the State Guard in its relation to the military forces of the Commonwealth and the various statutes governing their organization and maintenance. Various similar questions, the answers to which depend upon that status, have already arisen and others are likely to arise. Accordingly, I

propose to discuss that matter somewhat more broadly than the terms of your request necessarily require.

The provision for the organization of a State Guard, then called a home guard, was first made by Gen. St. 1917, c. 148, which took effect April 5, 1917. Section 1 authorized the Commander-in-Chief in time of war to raise by voluntary enlistment and organize such a body from certain specified classes of citizens of the United States who are inhabitants of the Commonwealth. Section 2 provides as follows: —

> The home guard may be of such numerical strength, and shall be so organized, maintained, officered, armed and equipped, and enlisted for, or disbanded from, such service within the commonwealth at any time and on such terms as the commander-in-chief may from time to time by executive order determine. When called for service the home guard shall perform such duties as shall be prescribed by order of the commander-in-chief, and all members of the home guard shall have and exercise throughout the commonwealth all the powers of constables, police officers and watchmen, except the service of civil process. The compensation of officers and men of the home guard, when called by executive order for service and while on such service, shall be fixed by the commander-in-chief, and shall in no event exceed the compensation of officers and men of the national guard of like grade.

By section 3 certain provisions of the existing military law relating to the election, appointment and authority of officers and to the compensation of members injured in the discharge of their duty are made applicable to this force. By section 4 it is exempted from the provisions forbidding bodies not expressly authorized to drill with firearms or to maintain an armory. Except in these respects there is no attempt to extend the general statutes for the government and maintenance of the organized militia to this body. Section 6 is as follows: —

> For the purpose of carrying out the provisions of this act the governor is authorized to expend the sum of two hundred thousand dollars, to be taken from the sum of one million dollars appropriated by chapter two hundred and two of the Special Acts of the year nineteen hundred and seventeen.

The appropriation referred to is a special emergency appropriation made in view of the exigencies of a possible war.

By Gen. St. 1917, c. 327, approved May 25, 1917, the statutes relating to the militia of the Commonwealth were

codified, revised and amended. No part of the statutes then in force as to the State Guard was in any way incorporated in this codification or referred to therein. They appear in no way to have been repealed or otherwise affected by it. (See § 268.)

By Gen. St. 1917, c. 331, the Governor is authorized to "incur expenses, not exceeding two hundred and fifty thousand dollars, for the maintenance of the state guard, so-called, when said guard is called for active duty."

On Aug. 20, 1917, the Governor, as Commander-in-Chief, issued the following executive order: —

(*a*) By the authority vested in me by chapter 148, General Acts of 1917, I prescribe that the Guard authorized by said chapter 148 shall be organized, maintained, officered, armed and equipped, as the organized militia is organized, maintained, officered, armed and equipped, under the provisions of chapter 327, General Acts of 1917, in so far as the provisions of said chapter 327 are not inconsistent with the provisions of said chapter 148.

(*b*) All officers of the hereinbefore mentioned Guard are directed to execute any and all lawful commands issued to them by the proper persons mentioned in sections 25 to 34, both inclusive, chapter 327, General Acts of 1917.

Obviously, the State Guard, not being organized in accordance with the Federal law (Act of June 3, 1916) or in accordance with the laws governing the Massachusetts Volunteer Militia (St. 1908, c. 604; Gen. St. 1917, c. 327), cannot be a part of the National Guard.

The limited provisions of the statutes above set forth dealing with the organization, equipment and maintenance of this force seem to me to make it clear that it was not intended to be a complete substitute for the National Guard, or to have all the powers and privileges of that force while it is absent from the Commonwealth in the service of the United States.

In my opinion, the State Guard may be regarded as a part of the unorganized militia of the Commonwealth temporarily organized in a limited way and for a limited purpose. Its character, duties and powers, in the main, are prescribed by Gen. St. 1917, c. 148, § 2. It is to be of such numerical strength, to be organized, equipped and maintained, and to have such terms of service as the Commander-in-Chief shall determine. "When called for service" it "shall perform such

duties as shall be prescribed by order of the commander-in-chief, and all members of the home guard shall have and exercise throughout the commonwealth all the powers of constables, police officers and watchmen, except the service of civil process."

Acting under the authority given to him by Gen. St. 1917, c. 148, § 2, the Commander-in-Chief, on Aug. 20, 1917, prescribed that so far as not inconsistent with chapter 148, the State Guard shall be organized, maintained, officered, armed and equipped in the same manner as the National Guard under Gen. St. 1917, c. 327. This was merely a convenient method of carrying out the provisions of section 2 of chapter 148.

By the same general order the Commander-in-Chief also directed all officers of the State Guard "to execute any and all lawful commands issued to them by the proper persons mentioned in sections 25 to 34, both inclusive, chapter 327, General Acts of 1917." These sections provide for the calling out of the Volunteer Militia by the Commander-in-Chief or a brigade commander in case of actual or threatened invasion or insurrection, or, in case of riot or public catastrophe, by certain local civil officers. The Governor has thus, under the general authority granted to him by chapter 148, prescribed that the State Guard shall perform the duties which ordinarily devolve upon the Volunteer Militia under those sections. So far as I am informed this is the only duty as yet assigned to this force, but it is at any time subject to be called to active service within the Commonwealth and assigned to perform such emergency duties therein as the Commander-in-Chief shall by general or special order direct.

The status of the State Guard being as above determined, the various questions which have arisen as to the scope of its duties and the manner of its organization and maintenance may readily be answered. Particularly is this so as to the use of appropriations. The appropriations made by Spec. St. 1917, c. 292, are declared to be "for salaries and expenses in the department of the adjutant general, and for certain allowances and expenses of the land and naval forces." Its items cover the annual appropriations ordinarily made for the Volunteer Militia. In large part it covers various annual allowances established by law for that militia. (St. 1908, c. 604, §§ 173 and 177, as amended by Gen. St. 1917, c. 105.) The term "land and naval forces" used in this appropriation statute

is plainly used to describe the land forces and the naval forces as defined in the codification of the military laws shortly after enacted by the same General Court. (See Gen. St. 1917, c. 327, §§ 78 and 194.) These definitions do not include the State Guard, and, as already pointed out, this codification does not purport to deal with that organization. Furthermore, definite special provisions have been made for financing it. By St. 1917, c. 148, § 6, the Governor was authorized to expend the sum of $200,000 for its organization. By Gen. St. 1917, c. 331, he was authorized "to incur expenses, not exceeding two hundred and fifty thousand dollars for the maintenance of the state guard, so-called, when said guard is called for active duty," the amount thus expended to be raised by a loan. These two statutes fully cover the matter; the former providing for the expense of organizing and equipping the State Guard, and the latter for its maintenance when and if called for active duty. If either or both of the amounts thus authorized prove inadequate, the Governor, with the consent of the Council, may unquestionably apply to such purpose any part of the second war emergency appropriation of $1,000,000 authorized by Gen. St. 1917, c. 324.

Accordingly, answering your specific question, in my opinion no part of the appropriations made by Spec. St. 1917, c. 292, for the land and naval forces of the Commonwealth may be used in organizing, maintaining and training the State Guard.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

War Service — Employees of Commonwealth — Amount paid by Commonwealth to those entering Military or Naval Service of the United States.

The so-called family allowance granted to enlisted men in the military or naval forces of the United States by Act of Congress approved Oct. 6, 1917, is to be regarded as part of the compensation received by such men from the United States, for the purpose of computing the amount which an employee of the Commonwealth is entitled to receive from this Commonwealth under the provisions of Gen. St. 1917, c. 301.

DEC. 4, 1917.

Hon. ALONZO B. COOK, *Auditor of the Commonwealth.*

DEAR SIR: — You have requested my opinion as to whether the so-called family allowance granted to enlisted men in the

military and naval forces of the United States by sections 204 to 210, inclusive, of an Act of Congress approved Oct. 6, 1917, is to be regarded as a part of the compensation received by such men from the United States in administering the provisions of Gen. St. 1917, c. 301.

This family allowance is an amount not exceeding $50 a month which is paid, upon application and subject to certain restrictions, to the wife and children of all enlisted men in the military and naval forces of the United States and to certain other relatives who are shown to be in whole or in part dependent upon them. It is a payment made on account of the enlisted man because of the services which he is rendering in the performance of his duty, for the purpose of enabling him the better to perform his legal and moral obligations with reference to the support of his family. This payment ceases upon the death of an enlisted man in the service or one month after his discharge from the service.

Though the matter is not entirely free from doubt, it seems to me, on the whole, that this payment may and fairly ought to be regarded as a part of "the compensation received by him from the United States," within the meaning of Gen. St. 1917, c. 301, § 1. The allowance paid relieves him, to the extent thereof, of an obligation that he otherwise would have to assume. The members of Class A of the Federal act, for whom allowances are made, are those whom a man ordinarily is bound by law to support, while the allowances to the members of Class B under the act are to be granted only if and while the member is dependent in whole or in part on the enlisted man, and then only if and while the enlisted man makes a voluntary allotment of his pay for said member. Thus, the benefit of the payment accrues to the enlisted man fully as much as if paid to him directly and by him used to discharge obligations imposed on him by law or voluntarily assumed. Any other interpretation would place an employee of the Commonwealth mustered into the military or naval service of the United States, and his family, in a better financial position than if he had not enlisted. It would result in their having the benefit of an amount equivalent to the full salary which he was receiving from the Commonwealth at the time of his enlistment and in addition the amount of this family allowance paid by the United States. I cannot believe that it was the intention of the General Court that such a result should

follow from the enactment of this statute. It rather was its purpose to place an employee of the Commonwealth enlisting in the military or naval service in the same financial position that he would have been in if he had not so enlisted. In my opinion, the statute should be so interpreted as to carry out this purpose, and not, unless absolutely necessary, to place the employee in a better position financially than he was in before enlistment.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

INDEX TO OPINIONS.

GRADE CROSSINGS.

Notices have been served upon this department of the filing of the following petitions for the appointment of special commissioners for the abolition of grade crossings: —

Berkshire County.

North Adams, Mayor and Aldermen of, petitioners. Petition for abolition of State Street and Furnace Street crossings. Edmund K. Turner, David F. Slade and William G. McKechnie appointed commissioners. Commissioners' report filed. Pending.

Pittsfield, Mayor and Aldermen of, petitioners. Petition for abolition of Merrill crossing in Pittsfield. Thomas W. Kennefick, Frederick L. Green and Edmund K. Turner appointed commissioners. Pending.

Stockbridge. Berkshire Railroad, petitioner. Petition for abolition of Glendale station crossing. Pending.

West Stockbridge, Selectmen of, petitioners. Petition for abolition of grade crossing at Albany Street. James D. Colt, Charles W. Bosworth and James L. Tighe appointed commissioners. Pending.

Bristol County.

Mansfield. Directors of New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of grade crossing at North Main, Chauncey, Central, West, School and Elm streets in Mansfield. Samuel L. Powers, Stephen S. Taft and Wm. Jackson appointed commissioners. George F. Swain appointed commissioner in place of Wm. Jackson, deceased. Agreement to dismiss filed. Disposed of.

Taunton, Mayor and Aldermen of, petitioners. Petition for abolition of grade crossings at Danforth and other streets in Taunton. Thomas M. Babson, George F. Swain and

Edwin U. Curtis appointed commissioners. Charles H. Beckwith appointed commissioner in place of Thomas M. Babson, deceased. Commissioners' report filed. James A. Stiles appointed auditor. Pending.

Essex County.

Gloucester. Boston & Maine Railroad, petitioner. Petition for abolition of crossings at Magnolia Avenue and Brays crossing. Arthur Lord, Moody Kimball and P. H. Cooney appointed commissioners. Commissioners' report filed. A. W. DeGoosh appointed auditor. Auditor's third report filed. Pending.

Gloucester. Directors of Boston & Maine Railroad, petitioners. Petition for abolition of grade crossing between Washington Street and tracks of Boston & Maine Railroad. Pending.

Haverhill, Mayor and Aldermen of, petitioners. Petition for abolition of Washington Street and other crossings in Haverhill. George W. Wiggin, William B. French and Edmund K. Turner appointed commissioners. Commissioners' report filed. Fred E. Jones appointed auditor. E. A. McLaughlin appointed auditor in place of Fred E. Jones, deceased. Auditor's seventeenth report filed. Pending.

Lawrence, Mayor and Aldermen of, petitioners. Petition for abolition of crossing at Merrimac and other streets in Lawrence. Robert O. Harris, Edmund K. Turner and Henry V. Cunningham appointed commissioners. Pending.

Lawrence, Mayor and Aldermen of, petitioners. Petition for abolition of grade crossing at Parker Street. James D. Colt, Henry V. Cunningham and Henry C. Mulligan appointed commissioners. Pending.

Lynn, Mayor and Aldermen of, petitioners. Petition for abolition of Summer Street and other crossings on Saugus branch of Boston & Maine Railroad and Market Street and other crossings on main line. George W. Wiggin, Edgar R. Champlin and Edmund K. Turner appointed commissioners. Commissioners' report filed. Edward A. McLaughlin appointed auditor. Auditor's seventh report filed. Pending.

Lynn, Mayor and Aldermen of, petitioners. Petition for abolition of grade crossings at Pleasant and Shepard streets, Gas Wharf Road and Commercial Street, on the Boston, Revere Beach & Lynn Railroad. Pending.

Salem. Directors of Boston & Maine Railroad, petitioners. Petition for the abolition of grade crossings at Bridge, Washington, Mill, North, Flint and Grove streets in Salem. Patrick H. Cooney, George F. Swain and William A. Dana appointed commissioners. Pending.

Salem, Mayor and Aldermen of, petitioners. Petition for abolition of Lafayette Street crossing in Salem. Pending.

Franklin County.

Erving, Selectmen of, petitioners. Petition for abolition of grade crossing on the road leading from Millers Falls to Northfield. Samuel D. Conant, Arthur H. Beers and Charles C. Dyer appointed commissioners. Commissioners' report filed. Pending.

Greenfield, Selectmen of, petitioners. Petition for abolition of grade crossing at Silver Street. Stephen S. Taft, Henry P. Field and Thomas J. O'Connor appointed commissioners. Commissioners' report filed and recommitted. Stephen S. Taft, Jr., appointed commissioner in place of Stephen S. Taft resigned. Commissioners' second report filed. Pending.

Hampden County.

Palmer, Selectmen of, petitioners. Petition for abolition of Burley's crossing in Palmer. Pending.

Westfield, Attorney-General, petitioner. Petition for abolition of grade crossings at Lane's and Lee's crossings in Westfield. Patrick H. Cooney, Richard W. Irwin and Franklin T. Hammond appointed commissioners. Chas. E. Hibbard appointed commissioner in place of Richard W. Irwin, resigned. Commissioners' report filed. Walter F. Frederick appointed auditor. Auditor's third report filed. Pending.

Hampshire County.

Amherst, Selectmen of, petitioners. Petition for abolition of grade crossings at Whitney, High and Main streets. Railroad Commissioners appointed commissioners. Pending.

Middlesex County.

Acton, Selectmen of, petitioners. Petition for abolition of Great Road crossing in Acton. Benj. W. Wells, George D. Burrage and William B. Sullivan appointed commissioners. Commissioners' report filed. Fred Joy appointed auditor. Pending.

Arlington, Selectmen of, petitioners. Petition for abolition of grade crossings at Mill and Water streets. Pending.

Belmont, Selectmen of, petitioners. Petition for abolition of crossings at Waverley station. Thomas W. Proctor, Patrick H. Cooney and Desmond FitzGerald appointed commissioners. Pending.

Chelmsford, Selectmen of, petitioners. Petition for abolition of grade crossing at Middlesex Street. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Marble Street crossing. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Concord Street crossing. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Waverly Street crossing. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Bishop Street crossing. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Hollis and Waushakum streets crossings. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Claflin Street crossing. Pending.

Framingham, Selectmen of, petitioners. Petition for abolition of grade crossing at Willis Crossing. Pending.

Lowell, Mayor and Aldermen of, petitioners. Petition for abolition of Middlesex and Thorndike streets crossings. George F. Swain, Patrick H. Cooney and Nelson P. Brown appointed commissioners. Pending.

Lowell, Mayor and Aldermen of, petitioners. Petition for abolition of Boston Road or Plain Street, School, Walker and Lincoln streets crossings. Arthur Lord, David F. Slade and Henry A. Wyman appointed commissioners. Commissioners' report filed. A. W. DeGoosh appointed auditor. Auditor's tenth report filed. Pending.

Lowell, Mayor and Aldermen of, petitioners. Petition for abolition of crossing at Western Avenue and Fletcher Street. Pending.

Marlborough, Mayor and Aldermen of, petitioners. Petition for abolition of Hudson Street crossing in Marlborough. Walter Adams, Charles A. Allen and Alpheus Sanford appointed commissioners. Commissioners' report filed. Pending.

Newton, Mayor and Aldermen of, petitioners. Petition for the abolition of Concord Street and Pine Grove Avenue crossings in Newton. George W. Wiggin, T. C. Mendenhall and Edmund K. Turner appointed commissioners. Pending.

Somerville, Mayor and Aldermen of, petitioners. Petition for abolition of Park Street, Dane Street and Medford Street crossings in Somerville. George W. Wiggin, George F. Swain and James D. Colt appointed commissioners. Commissioners' report filed. James D. Colt appointed auditor in place of Patrick H. Cooney deceased. Auditor's twelfth report filed. Pending.

Somerville, Mayor and Aldermen of, petitioners. Petition for abolition of Somerville Avenue crossing in Somerville. George W. Wiggin, George F. Swain and James D. Colt appointed commissioners. Commissioners' report filed. James D. Colt appointed auditor in place of Patrick H. Cooney deceased. Auditor's tenth report filed. Pending.

Wakefield, Selectmen of, petitioners. Petition for abolition of Hanson Street crossing in Wakefield. Pending.

Waltham, Mayor and Aldermen of, petitioners. Petition for abolition of South Street crossing in Waltham. Geo. F. Swain, —— —— and Geo. A. Sanderson appointed commissioners. Pending.

Waltham, Mayor and Aldermen of, petitioners. Petition for abolition of Moody Street, Main Street, Elm Street, River Street, Pine Street, Newton Street and Calvary Street crossings in Waltham. Arthur Lord, Patrick H. Cooney and George F. Swain appointed commissioners. Pending.

Watertown, Selectmen of, petitioners. Petition for abolition of grade crossings at Cottage, Arlington, School, Irving and other streets in Watertown. Pending.

Wayland, Selectmen of, petitioners. Petition for abolition of grade crossing at State Road. George F. Swain, Harvey N. Shepard and Arthur W. DeGoosh appointed commissioners. Pending.

Weston, Selectmen of, petitioners. Petition for abolition of grade crossings at Central Avenue, Conant Road, Church

and Viles streets. P. H. Cooney, Louis A. Frothingham and Andrew M. Lovis appointed commissioners. Pending.

Winchester, Selectmen of, petitioners. Petition for the abolition of crossing at Winchester station square. George W. Wiggin, George F. Swain and Arthur Lord appointed commissioners. Commissioners' report filed and recommitted. Pending.

Norfolk County.

Braintree, Selectmen of, petitioners. Petition for the abolition of the Pearl Street crossing at South Braintree. Patrick H. Cooney, Frank N. Nay and George F. Swain appointed commissioners. Pending.

Braintree. Directors of New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of grade crossing at School, Elm, River and Union streets in Braintree. John L. Bates, Winfield S. Slocum and Arthur H. Wellman appointed commissioners. Commissioners' report filed. Pending.

Canton. Directors of New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of Dedham Road crossing in Canton. Samuel L. Powers, Stephen S. Taft and Wm. Jackson appointed commissioners. Commissioners' report filed. Recommitted. Agreement to dismiss filed. Disposed of.

Dedham, Selectmen of, petitioners. Petition for the abolition of Eastern Avenue and Dwight Street crossings in Dedham. Alpheus Sanford, Charles Mills and J. Henry Reed appointed commissioners. Commissioners' report filed. Fred E. Jones appointed auditor. Pending.

Dover, Selectmen of, petitioners. Petition for abolition of grade crossing at Springdale Avenue and Dedham and Haven streets. Public Service Commission appointed commissioners. Pending.

Foxborough. Directors of New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of grade crossing at Cohasset and Summer streets in Foxborough. Samuel L. Powers, Stephen S. Taft and Wm. Jackson appointed commissioners. Commissioners' report filed. Recommitted. Agreement to dismiss filed. Disposed of.

Needham, Selectmen of, petitioners. Petition for abolition of Charles River Street crossing in Needham. Pending.

Quincy. Directors of New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of Saville and Water streets crossings in Quincy. John L. Bates, Winfield S. Slocum and Arthur H. Wellman appointed commissioners. Commissioners' report filed. Pending.

Sharon. Directors of New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of grade crossing at Depot, Garden and Mohawk streets in Sharon. Samuel L. Powers, Stephen S. Taft and Wm. Jackson appointed commissioners. Commissioners' report filed. Recommitted. Agreement to dismiss filed. Disposed of.

Westwood. Directors of New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of Green Lodge Street crossing in Westwood. Samuel L. Powers, Stephen S. Taft and Wm. Jackson appointed commissioners. Commissioners' report filed. Recommitted. Pending.

Plymouth County.

Rockland, Selectmen of, petitioners. Petition for abolition of grade crossings at Union and other streets in Rockland. Pending.

Suffolk County.

Boston, Mayor and Aldermen of, petitioners. Petition for abolition of Dudley Street crossing in Dorchester. Thomas Post, Fred Joy and Edmund K. Turner appointed commissioners. Commissioners' report filed. James D. Colt appointed auditor. Auditor's tenth report filed. Pending.

Boston, Mayor and Aldermen of, petitioners. Petition for abolition of Freeport, Adams, Park, Mill and Walnut streets and Dorchester Avenue crossings. James R. Dunbar, Samuel L. Powers and Thomas W. Proctor appointed commissioners. Commissioners' report filed. Arthur H. Wellman appointed auditor. Auditor's twenty-second report filed. Pending.

Boston, Mayor and Aldermen of, petitioners. Petition for abolition of crossings at Saratoga, Maverick and Marginal streets in East Boston. Railroad Commissioners appointed commissioners. Commissioners' report filed. Robert O. Harris appointed auditor. Auditor's second report filed. Pending.

Boston. New York, New Haven & Hartford Railroad Company, petitioner. Petition for abolition of grade crossing at West First Street. Pending.

Revere, Selectmen of, petitioners. Petition for abolition of Winthrop Avenue crossing in Revere of the Boston, Revere Beach & Lynn Railroad. Pending.

Worcester County.

Clinton, Selectmen of, petitioners. Petition for abolition of Sterling, Water, Main, High and Woodlawn streets crossings. George W. Wiggin, William E. McClintock and James A. Stiles appointed commissioners. Commissioners' report filed. David F. Slade appointed auditor. Frederic B. Greenhalge appointed auditor in place of David F. Slade deceased. Auditor's thirteenth report filed. Pending.

Harvard. Boston & Maine Railroad, petitioner. Petition for abolition of a grade crossing near Harvard station. Pending.

Hubbardston, Selectmen of, petitioners. Petition for abolition of Depot Road crossing in Hubbardston. Pending.

Leominster, Selectmen of, petitioners. Petition for abolition of Water, Summer, Mechanic and Main streets crossings. George W. Wiggin, George F. Swain and Charles D. Barnes appointed commissioners. Commissioners' report filed. Recommitted. Pending.

Southborough, Selectmen of, petitioners. Petition for abolition of crossing on road from Southborough to Framingham. Samuel W. McCall, Louis A. Frothingham and Eugene C. Hultman appointed commissioners. Commissioners' report filed and recommitted. Pending.

Southborough, Selectmen of, petitioners. Petition for abolition of Main Street crossing at Fayville in Southborough. Pending.

Southbridge, Selectmen of, petitioners. Petition for abolition of grade crossings at Foster, Central and Hook streets. George F. Swain, P. H. Cooney and William F. Garcelon appointed commissioners. Pending.

Webster, Selectmen of, petitioners. Petition for abolition of grade crossing at Main Street. Pending.

West Boylston. Boston & Maine Railroad Company, petitioners. Petition for abolition of Prescott Street crossing. Pending.

Worcester, Mayor and Aldermen of, petitioners. Petition for abolition of crossings at Exchange, Central and Thomas and other streets. Arthur Lord, George F. Swain and Fred Joy appointed commissioners. Pending.

Worcester, Mayor and Aldermen of, petitioners. Petition for abolition of Grafton Street crossing and eight other crossings, including alterations of Union Station. James R. Dunbar, James H. Flint and George F. Swain appointed commissioners. Commissioners' report filed. James A. Stiles appointed auditor. Auditor's seventy-third report filed. Pending.

RULES OF PRACTICE

In Interstate Rendition.

Every application to the Governor for a requisition upon the executive authority of any other State or Territory, for the delivery up and return of any offender who has fled from the justice of this Commonwealth, must be made by the district or prosecuting attorney for the county or district in which the offence was committed, and must be in duplicate original papers, or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney: —

(*a*) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled.

(*b*) That, in his opinion, the ends of public justice require that the alleged criminal be brought to this Commonwealth for trial, at the public expense.

(*c*) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(*d*) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

(*e*) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(*f*) If the fugitive is known to be under either civil or criminal arrest in the State or Territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(*g*) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever; and that, if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

(*h*) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(*i*) If the offence charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretences, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required, or a sufficient reason given for the absence of such affidavit.

2. Proof by affidavit of facts and circumstances satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State on whose Executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the State where the alleged crime was committed at the time of the commission thereof, and is found in the State upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate. (A notary public is not a magistrate within the meaning of the statutes.) It must also be shown that a complaint has been made, copies of which must accompany the requisition, such complaint to be accompanied by affidavits to the facts constituting the offence charged by persons having actual knowledge thereof, and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application.

5. The official character of the officer taking the affidavits or depositions, and of the officer who issued the warrant, must be duly certified.

6. Upon the renewal of an application, — for example, on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted, — new or certified copies of papers, in conformity with the above rules, must be furnished.

7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.